Petition

81-1404

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLISLE W. BRISCOE,

Petitioner,

v.

SGT. MARTIN LAHUE,

Respondent.

CHRIS P. VICKERS, SR. and JAMES N. BALLARD,

Petitioners,

v.

SGT. JAMES W. HUNLEY, individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under 42 U.S.C. §1983.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CARLISLE W. BRISCOE,
Petitioner,
v.
SGT. MARTIN LAHUE,
Respondent.

CHRIS P. VICKERS, SR. and JAMES N. BALLARD,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Carlisle W. Briscoe, Chris P. Vickers, Sr., and James N. Ballard, respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered on October 27, 1981, affirming the United States District Court for the Northern District of Indiana, South Bend Division, and the United States District Court for the Northern District of Indiana, Hammond Division, respectively, which dismissed the claims raised by the petitioners under 42 U.S.C. §1983.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit,

affirming the judgment of the district courts below, appears in the Appendix hereto. The decision is also reported at 663 F.2d 713 (7th Cir. 1981). The unpublished Memoranda Opinions and Orders entered by the United States District Court for the Northern District of Indiana, South Bend Division, and the United States District Court for the Northern District of Indiana, Hammond Division, respectively, are also included in the Appendix.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on October 27, 1981. The jurisdiction for this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States of America:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privi-

leges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTES INVOLVED

42 U.S.C. §1983 (1976):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASES

Carlisle W. Briscoe v. Sgt. Martin La Hue

Carlisle W. Briscoe (hereinafter "Briscoe") was charged in a 1976 Indiana state court criminal prosecution with committing first-degree burglary, conspiracy to commit first-degree burglary, and assault. He was convicted by a jury for these offenses and sentenced. Briscoe's conviction was subsequently reversed by the Indiana Court of Appeals which held that the record evidence was insufficient to support his conviction. Briscoe v. State, 388 N.E. 2d 638, 643-47 (Ind. App. 1979).

Briscoe then brought a civil action under 42 U.S.C. §1983 against Sgt. Martin LaHue, a member of the Bloomington, Indiana police force, whose testimony had been crucial to the overturned conviction. He alleged that LaHue violated his civil and constitutional rights by lying under oath at several judicial proceedings relating to the state criminal prosecution. In particular, Briscoe charged that LaHue testified that a latent three-point fingerprint LaHue discovered at the scene of the crime could be linked to Briscoe, when in fact LaHue had been notified by the Latent Fingerprint Section of the Identification Division of the Federal Bureau of Investigation and Indiana State Police evidence technicians that no latent prints of value

were present on the lift. Notwithstanding the foregoing, LaHue testified that the fingerprint he lifted at the scene of the crime pointed to Briscoe, who was found guilty and imprisoned until his conviction was finally overturned.

On October 5, 1978, Briscoe's §1983 action was dismissed by the United States District Court for the Northern District of Indiana, South Bend Division, and judgment was entered for LaHue. The United States District Court for the Northern District of Indiana, South Bend Division granted LaHue's motion for summary judgment on the grounds that: (1) the facts alleged in plaintiff's complaint did not suggest that LaHue testified falsely concerning the latent fingerprints found at the scene of the crime, (2) allegations of

perjury alone are insufficient to state a claim for violation of due process rights, (3) LaHue was not acting under color of state law when he testified at the criminal proceedings, and (4) Briscoe is collaterally estopped from asserting that LaHue testified falsely at the criminal trial. 663 F.2d at 715-16.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. However, the Court did so only on the basis that the allegations of perjury were insufficient to state a claim for violation of due process rights. In reaching this decision, the Court of Appeals held that Officer LaHue was absolutely immune from liability under 42 U.S.C. §1983, even if he had perjured himself at Briscoe's trial. The Court

of Appeals expressed no opinion on the District Court's finding that the facts alleged did not suggest perjury. The Court of Appeals did observe that the application of collateral estoppel was inappropriate where Briscoe's conviction had been overturned. 663 F.2d at 716, n.1. The Court of Appeals, however, expressed explicit disagreement that, as a matter of law, the testimony of a police officer is never under color of law and indicated that, under certain circumstances, such testimony could indeed be considered to have been given under color of law. 663 F.2d at 721, n.4.

CHRIS P. VICKERS, SR. and JAMES N. BALLARD,
v.
SGT. JAMES W. HUNLEY

Vickers and Ballard also brought an action under 42 U.S.C. §1983

alleging violations of their civil and constitutional rights during the course of an Indiana State prosecution against them. They both charged that their constitutional rights to due process of law and to a fair trial by an impartial jury were violated when Sgt. James W. Hunley of the Cedar Lake, Indiana, Police Department testified falsely at their joint criminal trial.

Hunley testified that Vickers and Ballard made contemporaneous exculpatory statements after the two men had been together following their arrest. In fact, Vickers and Ballard contend that Sgt. Hunley knew that the statements were made some two hours apart, and before Vickers and Ballard had any chance to collaborate with respect to their exculpatory statements. As a

result of Hunley's perjured testimony, the prosecutor was allowed to assert that the similarities between the statements of Vickers and Ballard were the result of plaintiffs "having been together and getting their stories straight." It was thus made to seem to the jury that the exculpatory statements were fabricated and worthless.

Hunley's motion to dismiss was granted by a federal magistrate on February 13, 1980. The bases for the magistrate's ruling were: (1) Hunley's testimony was not under color of state law; (2) Hunley was entitled to absolute immunity as a witness; and (3) the false testimony of a witness is not a due process violation unelss it is knowingly used by the prosecutor to obtain a conviction. The District Court affirmed

the magistrate's dismissal on March 25, 1980, agreeing with the Magistrate that Hunley was not acting under color of state law when he testified at trial. The Court of Appeals affirmed the District Court for the same reason cited above in the Briscoe case. However, the Court of Appeals, like the District Court, refrained from comment on the Magistrate's finding that a due process violation results only when knowingly used by the prosecutor.

The plaintiff Charles Talley in a third case consolidated for briefing and argument in the Court of Appeals in the case of Talley v. Crosson, et al., No. 79-1279, is not a party to this petition and the decision of the Court in his case, thus, is not discussed herein.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS NEVER DECIDED THE ISSUE OF WHETHER POLICE OFFICERS MAY BE GRANTED ABSOLUTE WITNESS IMMUNITY FROM CIVIL LIABILITY UNDER 42 U.S.C. §1983. PETITIONERS WILL BE DEPRIVED OF THEIR CIVIL AND CONSTITUTIONAL RIGHTS UNLESS THE COURT ADDRESSES THIS ISSUE BY APPLYING THE SAME ANALYSIS IT HAS BROUGHT TO BEAR ON OTHER §1983 IMMUNITIES.

Petitioners Carlisle W. Briscoe, Chris P. Vickers, Sr., and James N. Ballard allege that the false testimony of police officers Sgt. Martin LaHue and Sgt. James Hunley deprived Petitioners of their civil and consti-

tutional rights to due process of law under the Fifth and Fourteenth Amendments and a fair trial under the Sixth and Fourteenth Amendments. The provision of absolute witness immunity deprived petitioners of redress of their grievances as sought under 42 U.S.C. §1983.

Section 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. §1983 (1976), provides a statutory remedy for American citizens or people who come under the jurisdiction of our laws who have had their civil and constitutional rights violated by persons acting under color of law. Although §1983 speaks of subjecting "every person" guilty of such deprivations to civil liability, the Supreme Court has, in

various cases, analyzed traditional immunities from tort liability and determined whether or not such immunities should be extended to the constitutional context. Imbler v. Pachtman, 424 U.S. 409, 418, (1976). Historically, witnesses were granted absolute immunity from civil liability arising from their testimony relevant to the court's inquiry. Court of Appeals, supra at 663 F.2d 718. The Supreme Court, however, has refused to engraft onto §1983 every common law immunity and defense:

> "Indeed, because the 1871 Act was designed to expose State and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of §1983. Only after careful inquiry into considerations of both

> history and policy has the Court construed §1983 to incorporate a particular immunity defense."

City of Newport v. Facts Concerts, _____ U.S. _____, 49 U.S.L.W. 4860, 4863 (1981); See also Imbler v. Pachtman, supra, at 424; Owen v. City of Independence, 445 U.S. 622, 638 (1980).

It is therefore against this backdrop of "careful inquiry into considerations of both history and policy" that all interpretations of §1983 and immunity therefrom must be evaluated.

The United States Court of Appeals for the Seventh Circuit attempted such an inquiry in the instant case. The Court of Appeals noted at the outset that the question of whether a police officer who lies as a witness should be made to answer in damages for

his perjurious testimony can only be answered after competing policy considerations are weighed and resolved. The court noted that the balance has traditionally been struck between the public's interest in the "fearless exercise of discretion" by its state officials and the national interest in holding its officials accountable for violations of rights secured by the Constitution and laws of the United States. Court of Appeals, supra, at 718-9. This balance has operated in the past to grant absolute immunity from civil liability to judges, Pierson v. Ray, 386 U.S. 547 (1976), prosecutors, Imbler v. Pachtman, supra, and legislators, Tenney v. Brandhove, 341 U.S. 367 (1951). Qualified immunity based on actions taken in "good faith" has been

given to school board officials, Wood v. Strickland, 420 U.S. 308 (1975), prison officials, Procunier v. Navarette, 434 U.S. 555 (1978), and state executive officials, Scheuer v. Rhodes, 416 U.S. 232 (1974). In Pierson v. Ray, supra, at 557, a case based on false arrest, the Supreme Court made available the affirmative defense of qualified immunity for police officers. At the same time, the Court took pains to add that "[T]he common law has never granted police officers an absolute and unqualified immunity..." Id. At 555.

Petitioners note an air of finality and certainty to the balances that have been struck in many federal court decisions measuring the immunities of judges, prosecutors, legislators, state executive officials, school board

and prison officials, and police officers carrying out arrests and other investigative duties out of court. No doubt this certainty can be traced to the fact that the Supreme Court has made the final decision in each of these instances. Petitioners contend, however, that there is not so much certainty in the area of witness immunity. Specifically, Petitioners find that the Supreme Court has never ruled on the question of whether a police officer, who, as in the instant cases, testifies perjuriously as a witness about activities conducted in his official capacity may be held civilly liable under §1983. This air of uncertainty is borne out by the decision of the Court of Appeals.

The Court of Appeals advanced numerous reasons for imposing civil

liability upon officers LaHue and Hunley. The court quoted extensively from the decision rendered in Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978), wherein the United States Court of Appeals for the District of Columbia observed that the perjured testimony of a police officer has import of constitutional dimensions, and is therefore not deserving of the absolute immunity granted to witnesses at common law:

> "Whatever the precise nature of the immunity accorded to witnesses at common law, that immunity applies without distinction to any individual serving as a witness in a judicial proceeding. On the other hand, where a constitutional infringement is alleged, the defendant-witness will almost invariably be a Government official. (At minimum, the 'under color of law' requirement will

assure some direct government involvement in the challenged testimony.) This is a crucial difference. Policy considerations counselling the insulation of private citizens from civil liability arising from their performance as witnesses do not apply with equal force when a Complaint charges that constitutional rights have been violated by a public employee operating from the witness stand.

The unique importance of constitutional rights hardly needs restatement. Both Congress and the Supreme Court have created causes of action to provide a remedy for official misconduct which infringes constitutionally protected interests. Given this notably solicitous attitide toward the effectuation of constitutional guarantees, it can be asserted with both reason and authority that absolute immunity is not to be extended to the constitutional tort context absent the most compelling justification.

Id. at 28 (emphasis in original), quoted in Court of Appeals, supra, at 719. In conjunction with Briggs' rejection of absolute immunity for witnesses, in the constitutional context, the court below cited the case of Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), vacated and remanded on other grounds, 424 U.S. 961 (1976). In Hilliard, it was held that a police officer who "knowingly gives evasive, misleading, and deceptive testimony during a criminal trial cannot escape civil liability..." Id. at 1349. The fact that the offending officer may give the testimony in question at the direction of the prosecuting attorney was held to be irrelevant to the imposition of §1983 liability against the witness. In Briggs and Hilliard, the District of

Columbia and Sixth Circuits have clearly determined that police officers cannot commit perjury and escape liability by ducking behind the common law absolute immunity granted to lay witnesses.

The Court of Appeals found much in Briggs and Hilliard to recommend against absolute immunity for police officers who offer perjurious testimony. Allowing as to how "the fear of civil liability might dissuade witnesses from testifying," and thereby justify absolute immunity, the court went on to state that public officials, "who may be obligated to testify as an aspect of their official duties...would be less intimidated than the lay witness by the threat of a §1983 action," and might not require unqualified immunity from civil liability. Court of Appeals, supra, at

719. In addition, the court below, aware that "in those cases granting absolute immunity in the §1983 context, the need to protect the fearless exercise of discretion has been a paramount consideration," Id. at 729, correctly perceived that a witness exercises no discretion on the stand. A witness is sworn "to tell the truth, the whole truth, and nothing but the truth, so help me God." There is no room for judgment, no room for discretion. Id. at 719-20. How different the case of the police officer witness is from the Imbler v. Pachtman case of the prosecutor, who must exercise discretion in myriad ways during the course of the criminal prosecution!

A very important point made by the Court of Appeals was the recognition

that "abuse of the judicial process generally, and perjury and subornation of perjury specifically, appear to have been prominent concerns prompting enactment of the 1871 Act by the 42d Congress, citing 1B. Schwartz, Statutory History of the United States: Civil Rights 597-653 (1970). Id. at 720. See also, Dennis v. Sparks, 449 U.S. 24 (1980) at 31-32.

After delivering these powerful justifications for refusing absolute immunity for police officers who testify perjuriously, about official activities, and after taking notice of the conflict existing in this area among the judicial circuits, the court below felt constrained to adopt the opposite view and held that the doctrine of absolute witness immunity applied in these cases.

The doctrine of absolute witness immunity in the constitutional context has been derived from precedent of questionable strength. For example, the United States Court of Appeals for the 8th Circuit decided in Myers v. Bull, 599 F.2d 863 (8th Cir.) cert. denied, 444 U.S. 901 (1979), that a police officer's perjured testimony is not cognizable under §1983. Id. at 866. The court based this conclusion on Imbler v. Pachtman, supra. But Imbler was concerned almost exclusively with prosecutors who, in their exercise of discretion as part of the prosecutorial function, differ in critical respects from police officers for purposes of §1983 immunity. So too with Burke v. Miller, 580 F.2d 108 (4th Cir. 1978) cert. denied, 440 U.S. 930 (1979), in

which Imbler once again sufficed to gain immunity for a lay witness. The Imbler decision is inapposite to the facts facing Petitioners Briscoe, Vickers and Ballard. Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976), also looks to Imbler as a lodestar, but does not involve a police officer who lied under oath. Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978) is no more illuminative of possible bases for the extension of absolute immunity to police officers than Brawer, upon which it depends entirely for disposition of a lay witness immunity question. The court below found language in Butz v. Economou, 438 U.S 478, 511-12 (1978), helpful because its recent comments on witness immunity generally, "although not controlling, seem deliberate and authoritative."

Court of Appeals, supra at 13. However, Butz was only a slight extension of the policy evinced in Pierson v. Ray. This policy does not apply to a lying witness. Id. at 512.

A review of the precedent contrary to Petitioners' argument leads to the conclusion that, in this instance, there is no well-reasoned precedent for the proposition that officers LaHue and Hunley are immune from damages under 42 U.S.C. §1983 for not telling the truth on the witness stand. Looking beyond the desires of the individual plaintiffs in the instant case, it is evident that cases bearing at best a tangential relationship to the question of §1983 remedies for perjured police testimony guided the Seventh Circuit in its decision. The consequences of such

a judicial policy are far-reaching for future litigants who wish to make police officers answer in damages for lying at their trials. In the words of Judge Winter, who concurred in the result achieved in Burke v. Miller, supra, but disagreed with the reasoning of the majority:

> "Of course, a witness is generally afforded absolute immunity in ordinary litigation, as the majority documents. But should the rule of Imbler v. Pachtman, (Citation), establishing the absolute immunity of a prosecutor from liability under §1983, be extended to a state employee who is a witness in a state prosecution and who allegedly perjures himself to achieve improperly a conviction? I lack the certainty with which the majority responds affirmatively."

It is precisely this lack of certainty which argues most persuasively for review by the Supreme Court.

Finally, the Court of Appeals found two further justifications for absolute immunity for officers LaHue and Hunley which merit consideration by the Court. First is the notion that, were witnesses deprived of immunity, baseless suits would be brought by disgruntled former defendants seeking §1983 damages. Court of Appeals, supra, at 720. This fear of retaliatory litigation is unsupported by evidence and is, in any event, confined by the Court below to allegations of lay witnesses conspiring with prosecutors to achieve convictions. Such a prospect, if it indeed presents a problem, bears no relationship to the facts of the instant case, where police

officers acting on their own -- not lay witnesses -- are accused of lying on the witness stand in order to help convict Petitioners.

Secondly, the Court of Appeals suggested that existing criminal sanctions against perjury and the built-in trial safeguard of cross-examination would offer enough deterrence to would-be perjurors to obviate the necessity of a §1983 civil remedy. The court below never indicated that a police officer serving as a witness would be deterred by trial protections and criminal sanctions, nor did the court suggest that a prosecutor would be especially quick to bring a criminal perjury charge against a law enforcement officer, who after all is, along with the prosecutor, a member of the government's investigative team

in criminal cases like the ones involving Petitioners. Judge Winter's concurrence in Burke v. Miller speaks to this point:

> "...it may well be concluded that the criminal penalties for perjury should not alone be deemed a sufficient safeguard to prevent the constitutional tort resulting from perjury by a witness testifying in a governmental capacity. And I question whether a witness willing to commit perjury and to risk prosecution would actually be deterred by the threat of a civil suit. These are problems that I find difficult to resolve."
>
> Burke v. Miller, supra, at 112.

Judge Winter's calls for a judicial resolution of this issue should not go unheeded by the High Court.

The proper balance has yet to be struck between the "inhibiting effect

of possible harrassment of civil suits on the performance of official duties" by a police officer against "a private citizen's right to redress a denial of constitutional right." Justice will not be done to the Petitioners until the Supreme Court, in keeping with its policy of "careful inquiry into considerations of history and policy" underlying §1983 immunity defenses, City of Newport v. Fact Concerts, supra, attacks the issue of whether a police officer who testifies perjuriously as a witness may continue to be absolutely immune from civil liability. The question is ripe for resolution.

II.

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI IN ORDER TO RESOLVE A SERIOUS CONFLICT AMONGST THE CIRCUIT COURTS OF APPEALS AS TO WHETHER A POLICE OFFICER IS IMMUNE FROM LIABILITY UNDER 42 U.S.C. §1983 FOR TESTIFYING FALSELY UNDER OATH AT A STATE COURT CRIMINAL TRIAL

The D.C. and Sixth Circuits have decided the issue at bar contrary to the Court below and have held that there is liability under section 1983 for perjurious testimony given by law enforcement agents. Briggs v. Goodwin, 569 F.2d 101 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978); Hilliard v. Williams, 516 F.2d 1344 (8th Cir.

1975), vacated and remanded on other grounds, 424 U.S. 961 (1976).

The Seventh Circuit has now joined the Third, Fourth, Eighth, and Ninth Circuits in taking the contrary view. Brawer v. Horwitz, 535 F.2d 830 (3rd Cir. 1976); Burke v. Miller, 580 V.2d 108 (4th Cir. 1978) cert. denied, 440 U.S. 930 (1979), Myers v. Bull, 599 F.2d 863 (8th Cir.), cert. denied, 444 U.S. 901 (1979); and Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978).

Decisions have now been rendered in seven different circuits in the last six years, with a five to two split in the Circuits Courts' decisions. This Court should accept this case in order to resolve this conflict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and Order of the Court of Appeals for the Seventh Circuit affirming the United States District Court for the Northern District of Indiana, South Bend Division, and the United States District Court for the Northern District of Indiana, Hammond Division, respectively, which dismissed the claims raised by Petitioners under 42 U.S.C. §1983.

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Appendix

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 78-2378
CARLISLE W. BRISCOE,

Plaintiff-Appellant,

v.

SGT. MARTIN LAHUE,

Defendant-Appellee.

No. 79-1279
CHARLES TALLEY, JR.,

Plaintiff-Appellant,

v.

JAMES D. CROSSON, et al.,

Defendants-Appellees.

No. 80-1484
CHRIS P. VICKERS, SR. and
JAMES N. BALLARD,

Plaintiffs-Appellants.

v.

SGT. JAMES W. HUNLEY, Individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,

Defendant-Appellee.

ARGUED JANUARY 20, 1981--
DECIDED OCTOBER 27, 1981

Before CUMMINGS, Chief Judge, KUNZIG, Judge* and CUDAHY, Circuit Judge.

CUDAHY, Circuit Judge. These three consolidated cases present several issues concerning the scope of 42 U.S.C. §§1983, 1985(3) (1976). The common thread in these cases is the question whether police officers can be sued under §1983 for testifying falsely in criminal proceedings. In each case, judgment was entered for defendants. For the reasons stated below, we affirm.

I.

The facts in the cases before us are as follows.

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*/ The Honorable Robert L. Kunzig, Judge of the United States Court of Claims, is sitting by designation.

1. Briscoe v. LaHue, No. 78-2378

Carlisle W. Briscoe alleges in his pro se complaint that defendant Martin LaHue, a member of the Bloomington, Indiana, police force, violated Briscoe's federal due process rights by falsely testifying at several judicial proceedings in the course of a state prosecution against Briscoe.

Briscoe had been charged in 1976 with committing first degree burglary, conspiracy to commit first degree burglary, and assault. LaHue was called as a witness at two probable cause hearings and at Briscoe's criminal trial. He testified at each proceeding that a latent three-point fingerprint he discovered at the scene of the crime could be linked to Briscoe. Briscoe alleges that this testimony was false,

because LaHue had received an F.B.I. analysis of the fingerprint lift which stated that no latent prints of value were present on the lift.

On October 3, 1978, the District Court for the Northern District of Indiana, South Bend Division, granted LaHue's motion for summary judgment on the grounds that (1) the facts alleged in plaintiff's complaint did not suggest that LaHue testified falsely concerning the latent fingerprints found at the scene of the crime, (2) allegations of perjury alone are insufficient to state a claim for violation of due process rights, (3) LaHue was not acting under color of state law when he testified at the criminal proceedings, and (4) Briscoe is collaterally estopped from asserting that LaHue testified falsely at the

criminal trial.[1/]

2. Talley v. Crosson, No. 79-1279

In June, 1978, Charles Talley, Jr., was tried in the Criminal Division of the Circuit Court of Cook County, Illinois, for aggravated kidnapping, rape and armed robbery. Although Linda Gay, the alleged victim of these crimes, had initially testified at trial that Talley had abducted her from the street into his automobile as a prelude to the alleged rape and armed robbery, she

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1/ Although Briscoe was convicted by a jury for the offenses charged against him, his conviction was reversed by the Indiana Court of Appeals, which held that the record evidence was insufficient to support his conviction. Briscoe v. State, 388 N.E. 2d 638, 643-47 (Ind. App. 1979). Because his conviction was reversed, Briscoe is, of course, clearly no longer collaterally estopped from claiming that LaHue perjured himself.

recanted that portion of her testimony concerning the alleged abduction after the close of the state's case, and was allowed to testify in rebuttal that she voluntarily entered Talley's vehicle and drank with him. This revised testimony led to a contemporaneous dismissal of the aggravated kidnapping charge. Talley was, however, found guilty of rape and armed robbery.

Talley alleges in his pro se complaint that the defendants named in the complaint conspired to deprive him of his constitutional rights to due process, equal protection and effective assistance of counsel, and that this conspiracy was motivated by his race and his status as a convicted felon.

Talley charges in his complaint that defendant Albert J. Jordan, an

investigative officer in the Chicago Police Department, testified perjuriously regarding statements Talley allegedly made about the identify of the alleged victim of the crimes and Talley's purported recognition of the allged victim at a pre-trial identification proceeding.

Defendant Linda Gay is alleged to have perjured herself at Talley's trial by stating that Talley kidnapped, raped and robbed her when, in fact, according to Talley, he did not kidnap her but instead gave her money for having sexual relations with him.

Defendant William Bensen was an Assistant Cook County state's attorney who prosecuted Talley and who allegedly knowingly used perjured testimony at Talley's trial and later sought and obtained substantial sentences against

Talley at a hearing at which both Talley and his defense attorney were absent. Defendants Robbins, Lee T. Hettinger and John J. Cronin, assistant Cook County state's attorneys involved in certain post-conviction proceedings brought by Talley, are alleged to have withheld material evidence and information from Talley so as to deprive him of the opportunity to have a full and fair hearing on his post-conviction petition.

Defendant Bernard Carey, state's attorney for Cook County, is alleged to have knowingly used perjured testimony at Talley's trial and to have failed in his obligation to prevent his assistants from violating Talley's constitutional rights.

Defendant James D. Crosson, the presiding judge at Talley's trial,

is alleged to have violated Talley's rights by using perjured testimony and entering judgments against Talley beyond the scope of his jurisdiction.

Defendants Thomas E. Lief, apparently the court reporter at Talley's trial, and John Doe No. 1, alleged to be a court reporter at certain of the proceedings related to Talley's prosecution, are claimed to have altered and deleted portions of the transcripts of the proceedings against Talley so as to adversely affect Talley's position in the criminal proceedings.

Defendant Cyrus Yonan, Jr., Talley's trial counsel, and defendants James W. Reilley, Jordan Bell, Marshall R. Weinberg and Zelma L. Berger, attorneys retained by Talley to represent him after his conviction, are alleged to

have acted or failed to act in such a way as to have deprived Talley of the effective assistance of counsel. Reilley, Bell, Weinberg and Berger are also alleged to have deprived Talley of his right to have his conviction reviewed by means of a direct appeal or a post-conviction proceeding and any further appeal from a denial of post-conviction relief.

In orders without opinions dated August 7, 1978, and August 14, 1978, the District Court for the Northern District of Illinois, Eastern Division, granted the motions to dismiss of Yonan, Reilley, Bell, Berger and Weinberg. On February 22, 1979, the district court granted the motions of the remaining defendants to dismiss the complaint. The court found the "allegations of

conspiracy as conclusory as those [contained in plaintiff's complaint] to be of questionable sufficiency to state a cause of action under [42 U.S.C. §§ 1981, 1983, 1985 and 1986 (1976)], even within the rule of Haines v. Kerner, 404 U.S. 519 (1972)." The court also dismissed Carey, Benson, Robbins, Cronin and Hettinger on the basis of absolute prosecutorial immunity. Crosson, Lief and Doe were similarly found to have absolute immunity for acts performed in what was characterized as their judicial roles.

In dismissing the claims against Gay and Jordan, the district court suggested that they were protected by witness immunity and that, in any event, plaintiff was estopped from relitigating the issue of Gay's and

Jordan's credibility since those issues necessarily had been adjudicated adversely to plaintiff at his criminal trial.

3. Vickers v. Hunley, No. 80-1484

Chris P. Vickers, Sr., and James N. Ballard charge in their pro se complaint that defendant James W. Hunley, an officer of the Cedar Lake, Indiana, police department, violated their federal constitional rights to due process and to trial by an impartial jury by testifying falsely as a witness at their joint criminal trial in Indiana state court.

The subject matter of the testimony alleged to be perjured related to circumstances surrounding the custodial interrogation of Vickers and Ballard by the Cedar Lake police shortly after

their arrest. Purportedly, Vickers and Ballard had each made similar exculpatory statements during that interrogation, and Hunley is alleged to have falsely testified that these statements were given contemporaneously and after the two men had been together following their arrest. In fact, defendants contend, Hunley knew that the statements were made some two hours apart, and before Vickers and Hunley had the opportunity to collaborate with respect to their exculpatory statements.

On February 13, 1980, Hunley's motion to dismiss was granted by a federal magistrate because Hunley's testimony was not given under color of state law. The magistrate also determined that, as a witness, Hunley was entitled to absolute immunity. Additionally, the

magistrate found that plaintiff's complaint did not allege that his federal constitutional rights were violated, since the false testimony of a witness at trial does not constitute a due process violation unless it is knowingly used by the prosecutor to obtain a conviction. On March 25, 1980, the District Court for the Northern District of Indiana, Hammond Division, affirmed the magistrate's dismissal of the complaint. The court agreed with the magistrate that Hunley was not acting under color of state law when he testified at trial.

II.

Defendants Lahue, Gay, Jordan and Hunley claim that, as witnesses, they are entitled to absolute immunity from liability under §1 of the Civil

Rights Act of 1871, now codified at 42 U.S.C. §1983 (1976), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Although the statutory language excepts no person from its reach, it is now settled that the draftsmen of the Act intended to incorporate into the statute certain common law immunities "well grounded in history and reason." Imbler v. Pachtman, 424 U.S. 409, 418 (1976). Thus, absolute immunity from

damage actions under §1983 has been extended to judges, Pierson v. Ray, 386 U.S. 547 (1976), prosecutors, Imbler v. Pachtman, supra, and legislators, Tenney v. Brandhove, 341 U.S. 367 (1951). Qualified immunity from §1983 liability has been afforded to police officers, Pierson v. Ray, supra, school board officials, Wood v. Strickland, 420 U.S. 308 (1975), prison officials, Procunier v. Navarette, 434 U.S. 555 (1978), and state executive officials, Scheuer v. Rhodes, 416 U.S. 232 (1974).

Under the English common law, witnesses have long enjoyed absolute immunity from civil liability arising from their testimony. See, e.g., Dawkins v. Rokeby, 176 Eng. Rep. 800, 812 (C.P. 1866); Henderson v. Broomhead, 157 Eng. Rep. 964 968 (Ex. 1859); The King v.

Skinner, 98 Eng. Rep. 529 (K.B. 1772) (per Lord Mansfield, J.); Anfield v. Feverhill, 80 Eng. Rep. 113 (K.B. 1614); Cutler v. Dixon, 76 Eng. Rep. 886 (K.B. 1585). This rule of absolute witness immunity has been incorporated into American common law, with the qualification that, for the immunity to attach, the witness' statements must be relevant to the court's inquiry. See e.g., Chambliss v. Blau, 127 Ala. 86, 28 So. 602 (1899); Cooley v. Gaylon, 109 Tenn. 1, 70 S.W. 607 (1902); Marsh v. Ellsworth, 50 N.Y. 309 (1872); Barnes v. McCrate, 32 Me. 442 (1851). See also Restatement (Second) of Torts §588 (Tent. Draft No. 20, (1974).

By no means, however, does our determination that witnesses enjoy absolute immunity from civil liability

at common law end our inquiry concerning the appropriate immunity to be afforded witnesses in §1983 actions. As the Supreme Court noted in Newport v. Fact Concerts, Inc., 49 U.S.L.W. 4860, 4862-63 (June 26, 1981):

> One important assumption underlying the Court's [§1983 immunity] decisions . . . is that members of the 42d Congress were familiar with common law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common law principles to obtain, absent specific provisions to the contrary.
>
> At the same time, the Court's willingness to recognize certain traditional immunities as affirmative defenses has not lead it to conclude that Congress incorporated all immunities existing at common law. See Scheuer v Rhodes, 416 U.S. 232, 253 (1974). Indeed, because the 1871

> Act was designed to expose state and local officals to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of §1983. See Imbler v. Pachtman, 424 U.S., at 424; id., at 434 (concurring opinion); Owen v. City of Independence, 445 U.S. 622, 638 (1980). Only after careful inquiry into considerations of both history and policy has the Court construed §1983 to incorporate a particular immunity defense.

Thus, common law immunities are not to be imported wholesale into the 1871 Act. In Scheuer v. Rhodes, for example, the Court determined that the purposes of the Act would be frustrated if state executive officials were afforded the traditional absolute immunity from civil liability. Although the

policies underlying common law executive immunity -- e.g., encouraging the fearless exercise of discretion -- would seem to apply with equal force in §1983 actions, these policies were not found to be sufficient to override the national interest, expressed in §1983, in holding state officials accountable for violation of rights secured by the Constitution and laws of the United States. The Court therefore extended state executive officials only a qualified immunity from §1983 liability for those official acts committed reasonably and in good faith. 416 U.S. at 245-46.

Through a similar analysis, the court in Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978), rejected the application of absolute witness immunity in §1983 actions:

Whatever the precise nature of the immunity accorded to witnesses at common law, that immunity applies without distinction to any individual serving as a witness in a judicial proceeding. On the other hand, where a constitutional infringement is alleged, the defendant-witness will almost invariably be a Government official. (At minimum, the 'under color of law' requirement will assure some direct government involvement in the challenged testimony.) This is a crucial difference. Policy considerations counselling the insulation of private citizens from civil liability arising from their performance as witnesses do not apply with equal force when a Complaint charges that constitutional rights have been violated by a public employee operating from the witness stand.

The unique importance of constitutional rights hardly needs restatement. Both Congress and the Supreme Court have created causes of action to provide a remedy for official misconduct with

> infringes constitutionally protected interests. Given this notably solicitous attitude toward the effectuation of constitutional guarantees, it can be asserted with both reason and authority that absolute immunity is not to be extended to the constitutional tort context absent the most compelling justification.

Id. at 28 (emphasis in original). See also Hilliard v. Williams, 516 F.2d 1344 (8th Cir. 1975), vacated and remanded on other grounds, 424 U.S. 961 (1976).

There is much to be said for this conclusion. First, the policies underlying traditional witness immunity may not apply with equal force to the testimony of public officials. Absolute immunity is afforded by the common law to free witnesses "from intimidation by the possibility of civil liability for what they say." W. Prosser, The Law of

Torts §114, at 777-78 (4th ed. 1971). The fear of civil liability might dissuade witnesses from testifying, see Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colu. L. Rev. 463, 476 (1909), and cause witnesses to censor their own testimony, see Imbler v. Pachtman, 424 U.S. at 439-40 (White, J., concurring). But it may be that public officials, who in any event face the possibility of liability for most of their official acts, who may be obligated to testify as an aspect of their official duties, and who are normally represented by government counsel in §1983 actions, would be less intimidated than a lay witness by the threat of a §1983 action.

Second, a witness, at least in theory, exercises no discretion in the performance of his duty to answer fully

and truthfully all questions put to him, unless the requested information would be self-incriminating or would violate some other evidentiary privilege. But in those cases granting absolute immunity in the §1983 context, the need to protect the fearless exercise of discretion has been a paramount consideration. As the Imbler court stated in justifying absolute prosecutorial immunity:

> If a prosecutor had only qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential

> liability in a suit for damages.

424 U.S. at 424-25. Because witnesses do not exercise similar discretion, the need for absolute immunity seems correspondingly less compelling.

Another consideration militating against absolute immunity lies in the fact that abuse of the judicial process generally, and perjury and subornation of perjury specifically, appear to have been prominent concerns prompting enactment of the 1871 Act by the 42d Congress. See generally 1B. Schwartz, Statutory History of the United States: Civil Rights 597-653 (1970) (setting forth the legislative history of the 1871 Act). To afford witnesses absolute immunity, whenever it is recognized, necessarily overrides §1983's fundamental purpose of compensat-

ing individuals for deprivations of federal statutory and constitutional rights.

But despite these important considerations, the conclusion of the Briggs court has not generally prevailed. A substantial majority of the courts of appeals considerating this issue have held that witnesses are entitled to absolute immunity. See, e.g., Myers v. Bull, 599 F.2d 863 (8th Cir.), cert. denied, 444 U.S. 901 (1979); Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978); Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976).

In addition to the established common law tradition of absolute immunity, we perceive two other reasons that

justify this conclusion. First, although §1983 is directed primarily at public officials, private parties who are alleged to have conspired with public officials to violate an individual's federal rights can also be liable under §1983. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). In addition, private parties may be named as defendants in 42 U.S.C. §1985(3) (1976) actions. See Part IV, infra. There seems some basis to surmise that, were witnesses deprived of immunity for their testimony, baseless complaints alleging that lay witnesses conspired with prosecutors to deprive criminal defendants of a fair trial would proliferate. The prospect of being required to defend against such retaliatory suits by angry former defendants might well dissuade potential

complaining witnesses from pressing criminal proceedings.

Second, as with prosecutors and judges, absolute immunity from civil liability does not leave the public without any means of deterring witness misconduct or punishing such misconduct when it occurs. The rigors of cross-examination and the penalites of criminal prosecution at both the state and federal levels provide substantial checks against false testimony by witnesses.[2/]

2/ In discussing federal criminal sanctions for prosecutorial misconduct, the Imbler court stated:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. §242, the criminal

(Footnote continued on following page)

Although we thus find important considerations both favoring and weighing against absolute witness immunity, we are persuaded that recent comments addressed to the subject by the Supreme Court (although not controlling) seem deliberate and authoritative. In Butz v. Economou, 438 U.S. 478, 511-12 (1978), the Court stated:

> The cluster of immunities protecting the various participants in judge supervised trials stems from the character-

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(Footnote 2 continued from previous page)

> analog of §1983. The prosecutor would fare no better for his willful acts.

424 U.S. at 429 (citations and footnotes omitted). We believe that witnesses may be similarly liable to prosecution under 18 U.S.C. §242 (1976), assuming the requisite element of state action can be satisfied. See note 4, infra.

istics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall., at 348-49, controversies sufficiently intense to erupt in litigation are not easily capped by judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See Pierson v. Ray, supra, 386 U.S., at 554. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of

> error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowlege that their assertions wll be contested by their adversaries in open court. Jurors are carefully screened to remove all possiblity of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision making process, there is a less pressing need for individual suits to correct constitutional error.3/

3/ Absolute witness immunity in §1983 suits was also discussed approvingly in Justice White's concurring opinion in Imbler v. Pachtman, 424 U.S. at 439-40:

> [A witness] must be permitted to testify without fear of being sued if his testimony is disbelieved. . . Of course, witnesses should not be encouraged to testify falsely . . . However,

(Footnote continued on following page)

emphasis added.

We therefore conclude that Gay, Jordan, Briscoe and Hunley, as witnesses, are absolutely immune from §1983 liability and were therefore properly dismissed from these lawsuits.[4/]

(Footnote 3 continued from previous page) if the risk of having to defend a civil damage suit is added to the deterrent against perjury and subornation of perjury, the risk of self censorship becomes too great.

4/ Jordan, Briscoe and Hunley (all police oficers) also argue that their motions to dismiss were properly granted because, in testifying, they were not acting "under color of" state law as required by §1983. It is true that private parties are not acting under color of law when they testify at a criminal proceeding. See Grow v. Fisher, 523 F.2d 875, 879 (7th Cir. 1975). It is also true that acts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way "related to the performance of police duties." Johnson v. Hackett, 284 F.Supp. 933, 937 (E.D. Pa. 1968) (police officer not acting under color of state law when, while on duty, he called plaintiff derogatory names and challenged him to a fight).

(Footnote continued on next page)

III.

The remaining public officials named as defendants in Talley's complaint were also properly dismissed on the basis of absolute immunity.

Defendants Benson, Robbins, Crosson and Hettinger, prosecuting attorneys in plaintiff Talley's criminal

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(Footnote 4 continued from previous page)

> But we cannot agree that, as a matter of law, the testimony of a police officer concerning information obtained during the course of the officer's investigative duties is never under color of law, because it may be that the full performance of an officer's investigative responsibilities includes the duty to testify at a criminal proceeding to present the results of that investigation. If such a duty to testify existed as part of an officer's official functions, whether by regulation or by custom, see Adickes v. S. H. Kress & Co., supra, then the officer's testimony may well be under color of state law. Cf. Hilliard v. Williams, supra. In light of our witness immunity holding, however, we need not definitively address the color of law issue here.

prosecution, and defendant Carey, then state's attorney for Cook County, were alleged to have knowingly used perjured testimony and withheld material evidence from appellate tribunals. Carey was also alleged to have insufficiently supervised his assistants' prosecution of Talley. But Imbler v. Pachtman, supra, holds that prosecutors enjoy absolute immunity from civil suits for damages based on acts performed within the scope of the prosecutor's function as advocate. Since the misconduct alleged here is "intimately associated with the judicial phase of the criminal process," Imbler v. Pachtman, 424 U.S. at 430, it cannot form the subject of a civil rights claim for damages against these prosecutors. The motion to dismiss filed by these defendants was

therefore properly granted by the district court.

James D. Crosson, the presiding judge at Talley's criminal trial, was alleged to have knowingly "used" Gay's allegedly perjurious testimony at Talley's criminal trial. Crosson was also charged with entering a judgment of guilty against plaintiff on charges of rape and armed robbery and sentencing plaintiff to substantial periods of incarceration after these charges had been dismissed. Talley urges that the reinstatement of these charges, after their dismissal and in the absence of both defendant and his counsel, constituted an act entirely beyond the jurisdiction of defendant Crosson.

But we believe that the district court properly dismissed Judge Crosson

from the case under the doctrine of judicial immunity, which extends to all acts performed by judges in thier judicial capacity. As Judge Leventhal stated in Apton v. Wilson, 506 F.2d 83, 90 (D.C. Cir. 1974):

> The judge is not liable for any injuries resulting from acts within his jurisdiction, and jurisdiction is construed broadly so that a judge will not be held liable unless he acts without color of authority. See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872). The common law immunity of judges is fully applicable in suits under 42 U.S.C §1983 alleging deprivations of constitutional rights. Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

See also Stump v. Sparkman, 435 U.S. 349 (1977). There is no question that Judge Crosson was acting under color of his

judicial authority in presiding over Talley's trial and in entering judgment and sentence against him. The allegation that Crosson reinstated the charges against Talley after their dismissal is insufficient to suggest that Crosson's acts were done in "the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 357 (1978) (quoting Bradley v. Fisher, 80 U.S. 335, 351 (1871).[5/] See Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

5/ In Bradley, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. Id., at 352. Stump v. Sparkman, 435 U.S. at 357 n.7.

Lief and Doe, alleged to be the court reporters at the criminal proceedings against Talley, were properly dismissed by the district court under this court's holding in Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969), which extended the protection of judicial immunity to court reporters acting in the "discharge of their official responsibilities." Id. at 763.[6/]

IV.

Talley maintains that he stated a claim against defendants Reilley,

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6/ Dieu v. Norton is directly on point and is dispositive of the issue. Contra, Slavin & Curry, 574 F.2d 1256, 1265-66 (5th Cir. 1978). Were this a matter of first impression, the author of this opinion might have some difficulty in justifying judicial immunity for court reporters, whose duties do not significantly appear to involve the exercise of discretion.

Bell, Weinberg, Berger and Yonan and therefore that the district court's order granting thier motions to dismiss should be reversed. Yonan, as Talley's trial counsel, and Reilley, Bell, Weinberg and Berger, as Talley's post-conviction counsel, were not acting under color of state law in representing Talley. However, private parties may be liable under §1983 if they conspired with public officials to deprive a plaintiff of his constitutional rights. Adickes v. S.H. Kress & Co., supra, 398 U.S. at 152. Moreover, a cause of action can be stated under 42 U.S.C. §1985(3) (1976), even in the absence of state action,[7/] if it is alleged that

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7/ However, in this circuit an allegation of state involvement is necessary to state a claim under §1985(3) if "the federal right

(Footnote 7 continued on next page)

the defendants conspired for the purpose of violating plaintiff's right to equal protection of the laws. Griffin v. Breckenridge, 403 U.S. 88, 103-04 (1971).[8/]

Of course, Talley's pro se complaint is to be liberally construed, and should be dismissed for failure to state a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

(Footnote 7 continued from previous page) relied upon is one requiring an element of state action." Cohen v. Illinois Institute of Technology, 581 F.2d 658, 663-64 (7th Cir. 1978), cert. denied, 439 U.S. 1135 (1979).

8/ Section 1985(3) has been construed to require a showing of "some racial, or otherwise class-based, invidiously discriminatory animus behind the conspirator's actions." Griffin v. Breckenridge, 403 U.S. at 102; Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976).

Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). But even under the generous standard of Haines, conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss. Here, Talley's sole allegation of conspiracy against the 15 named defendants is contained in the following omnibus paragraph:

> That all defendants mentioned above and there [sic] agents, acted under color of state law and their private capacity, knowingly and wilfully, conspired together, with the malicious intent and purpose of depriving convicted accused and or Negro citizen and or convicted felon and or incarcerated client of Due process, Effective Assistance of counsel [sic], and Equal Protection of the Laws and Privileges of United States, to-wit without plaintiff's consent or knowledge.

This recitation of legal conclusions is wholly devoid of facts upon which a claim for relief can be based. Since Talley's complaint does not set forth any facts suggesting a conspiracy between state officials and the private defendants, it fails to state a §1983 claim. And since there are no allegations of specific facts suggesting a racial or other invidiously discriminatory animus behind the private defendants' alleged conspiracy, the complaint similarly fails to state a claim under §1985(3). Our conclusion goes not to artlessness which, of course, may be forgiven in such pro se complaints, but to the lack of intimation of any facts underlying the claim. As we stated in Tarkowski v. Bartlett Realty Co., 644 F.2d 1204, 1208 (7th Cir. 1980), "even a pro se litigant is required to allege

something in the way of facts before his allegations of conspiracy may be deemed to state a claim. . . mere conjecture that there has been a conspiracy is not enough. . . ."[9/] Dismissal of Talley's claim against Yonan, Reilley, Berger, Weinberg and Bell was therefore appropriate.[10/]

9/ See also Heidelberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978) ("We think, however, that broadside unspecific allegations of inducing perjury by numerous witnesses are insufficient even under the liberal pleading rules of Haines v. Kerner."); Mosher v. Saalfield, 589 F.2d 438, 441 (9th Cir. 1978) ("While it is true that conspiracy claims may be brought under §1983, . . . more than vague conclusory allegations are required to state a claim.").

10/ Although we find Talley's claim against Reilley, Bell, Weinberg, Berger and Yonan insufficient, Talley should be allowed to replead, if he so elects. See Tarkowski v. Bartlett Realty Co., supra, at 1207; Heidelberg v. Hammer, supra at 432-33.

For the foreging reasons, the judgment of the district courts are affirmed.[11/]

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

11/ With the caveat suggested by note 10, supra.

(163/M)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CARLISLE W. BRISCOE,	)	Entered:
	)	October 3, 1978
Plaintiff,	)	
	)	
v.	)	No. S 78-139
	)	
SGT. MARTIN LaHUE,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff has filed herein a pro se complaint for infringement of his civil rights under color of law pursuant to 42 U.S.C.A. §1983, and as such is a civil action. Plaintiff's complaint has as its basis the allegations that Sgt. Martin LaHue did knowingly and wilfully submit before the jury on March 23, 1977 false testimony and evidence concerning

a false three point fingerprint knowing that this print was refuted by the F.B.I. crime lab, as of no value concerning the print of the plaintiff. Therefore, plaintiff herein is asserting that the defendant, Sgt. Martain LaHue, committed perjury by testifying at a probable cause hearing on November 17, 1977.

The defendant with some fingerprint training, took a partial print from a piece of glass, compared it with the known print of the plaintiff, and testified at a probable cause hearing that "its my opinion that this is the same section that exists on the right thumb of Carlisle Briscoe." Such certainly is not perjury.

From the testimony contained in plaintiff's Exhibits "A", "B" and "C"

filed herein, it is established that the print lifted contained only three points, and that the F.B.I. requires eleven points for their particular identification procedures to be applicable. It is noteworthy, however, that they do not say the print is of "no value" as alleged by plaintiff; but that there were, for their purposes (the F.B.I.) "no latent prints of value." Subsequently, at plaintiff's trial, defendant testified concerning the three point print that in addition to plaintiff, there would probably be no more than fifty to one hundred people in Bloomington who had the same characteristics and, in the testimony on both direct and cross-examination in that trial (pages 1117 to 1128 of plaintiff's Exhibit "C" filed herein), and by the submitting of the

F.B.I. letter into evidence (page 1130 of plaintiff's Exhibit "C"), a full disclosure of the F.B.I.'s position on the "three point" print was submitted to the trier of fact. Certainly, as such, this is not perjury. Finally, at a subseguent probable cause hearing, the entire text of which is contained on page 10 of plaintiff's Exhibit "B" filed herein, the defendant again testified concerning the fingerprint, and again made a full disclosure of the F.B.I.'s position concerning same. Certainly, this is not perjury.

While it is true that a pro se complaint is held to less stringent standards than formal pleadings and should not be dismissed for failure to state a claim unless it appears beyong doubt that the prisoner can prove no set

of facts in support of his claim which would entitle him to relief, Hanies v. Kerner, 404 U.S. 518, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), it is equally true that broad and conclusionary statements, unsupported by factual allegations are not sufficient to support a cause of action under the Civil Rights Act, Marcedes v. Barrett, 453 F. 2d 391 (3d Cir. 1971. In the instant case the plaintiff has alleged broad and conclusionary statements, unsupported by factual allegations as represented by the Exhibits and pleadin herein, and as a matter of law has failed to state a cause of action against the defendant.

Even had the plaintiff established a prima facie case of perjury against defendant herein, he would not have stated a cause of action. Allega-

tions of perjury alone on the part of police officers are not sufficient to state a claim under the Civil Rights Act, Hudburt v. Groham, 323 F.2d 723 (6th Cir. 1963); and while it is true that due process of law forbids the knowing use of perjured testimony to procure a conviction, Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935), a person's constitutional rights are not violated simply because a witness may have testified falsely in his trial, McBride v. United States, 446 F.2d 229 (10th Cir. 1971), Johnson v. Stone, 268 F.2d 803 (7th Cir. 1959). In order for a defendant to be liable under 42 U.S.C. §1983 it is essential that he must have acted under color of state law to cause the denial of a federally protected right, and the courts have

repeatedly held that a witness is not acting under color of law but rather as any other witness of facts coming to their attention during the time they hold such official position, Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972), Spires v. Bottorff, 233 F. Supp. 441 (S.D. Ind. 1963, affirmed 7th Cir., 332 F.2d 179 cert. den., 379 U.S. 938, 85 S.Ct. 343, 13 L. Ed. 2d 349, reh. den., 379 U.S. 985, 85 S. Ct. 675, 13 L. Ed. 2d 579.

The Civil Rights Statute was not enacted nor designed to sponsor career litigants or permit duplicative efforts to prevail. This conclusion is required in the interest of judicial economy and the equity of protecting opposing parties usually, government officials, from vexatious duplicating

litigation. Thistlewaite v. City of New York, 362 F. Supp. 88 (S.D. N.Y. 1973), as a result, the principles of res adjudicata and issue preclusion are applicable to suits under the Civil Rights Act, Spence v. Letting, 512 F.2d 93 (10th Cir. 1975), Rachel v. Hill, 435 F.2d 59 (5th Cir. 1970).

Finally, at this point it should be noted that in plaintiff's affidavit in support of his Motion for a Permanent Injunction filed herein, plaintiff establishes that his criminal case is currently on appeal to the Indiana Court of Appeals. Everything that plaintiff relies on in his stated cause of action has been and was presented to the trier of fact in his state criminal proceeding; and, pursuant to his motion on file with this court, his

appeal of said matter is now pending. Therefore, so long as his conviction is not vacated, corrected, or amended, the bar of collateral estoppel applies to this action, Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974).

Therefore, defendant is entitled to Summary Judgment on the basis that the complaint motions, affidavits, exhibits and other pleadings herein established as a matter of fact that the defendant did not commit the alleged perjury.

So Ordered.

Enter October 3, 1978.

Allen Sharp
JUDGE, UNITED STATES
DISTRICT COURT

(82-A)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CHRIS P. VICKERS, SR. and JAMES N. BALLARD, Plaintiffs, v. SGT. JAMES W. HUNLEY, Individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department, Defendant.	Entered: February 13, 1980

ORDER

This cause came on to be heard on January 21, 1980, upon defendant's Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that plaintiff's Complaint fails to state a claim upon which relief can be granted. Plaintiffs,

Chris P. Vickers, Sr. and James N. Ballard, appeared pro se and defendant, James W. Hunley, appeared by his attorney, William T. Enslen, oral arguments on defendant's Motion were presented and defendant's Motion was taken under advisement.

I have examined the record before me which includes, among other things, plaintiffs' Complaint for damages, plaintiffs' Motion to Proceed in forma pauperis, defendant's Motion to Dismiss with supporting memorandum and plaintiffs' Response thereto with memorandum of law attached thereto. I have concluded from my review of the above-mentioned materials and applicable case law that, even if every alleged fact that is favorable to plaintiffs were true, such facts would not establish any

cause of action for the plaintiffs against the defendants. On the contrary, taking all the facts alleged in the light most favorable to the plaintiffs, and indulging every inference in support of plaintiffs' allegations, it is clear that the defendant is entitled to dismissal.

DISCUSSION

In deciding whether to grant motions to dismiss, the allegations of the complaint must be taken at face value, construed favorably to the pleader, and may not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. California Transport v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed. 2d 642 (1972); Scheuer v. Rhodes, 416

U.S. 232, 94 S.Ct. 1683, 40 L.Ed. 2d. 90 (1974); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957). Though willing to give the plaintiff the benefit of every doubt in judging a motion to dismiss, the Court shall not hesitate to dismiss a complaint which clearly does not state a cause of action. Taylor v. Nichols, 409 F. Supp. 927 (D. Kan. 1976), aff'd. 558 F.2d 561 (10th Cir. 1977).

Plaintiffs, inmates at the Indiana State Prison, Michigan City, Indiana, seek damages for violation of their civil rights by the defendant, individually and in his official capacity as a police officer of the Town of Cedar Lake, Indiana. Each plaintiff seeks One Hundred Fifty Thousand ($150,000.00) Dollars in compensatory

damages and Fifty Thousand ($50,000.00) Dollars in punitive damages in this action which was filed pro se on March 5, 1979. Predicating liability on 42 U.S.C. §1983, plaintiffs allege only that the defendant knowingly and wilfully perjured himself at the state court criminal trial of the plaintiffs which violated their right to a trial by an impartial jury and deprived them due process of law.

In order for a defendant to be liable under 42 U.S.C. §1983, it is essential that he must have acted under color of state law to cause the denial of a federally produced right. Espinoza v. Rogers, 470 F. 2d 1174 (CA10, 1972). Here allegedly the defendant testified falsely against the plaintiffs in their criminal trial in an Indiana State

Court. In testifying, although an officer of the Town of Cedar Lake, Indiana, police department, he did not purport to act pursuant to any state law but in response to either a request from the state prosecuting attorney or an order of the State Court which directed him to appear and testify. In this respect he was no different than any other witness. True, the matters concerning which the defendant testified related to what he had done, heard and observed while performing his duties as a police officer. However, plaintiffs' claim is based not on what defendant <u>did</u> while clothed with his official authority but what transpired <u>thereafter</u>. In order that conduct be under color of state law there must be <u>misuse of power possessed</u> by the defendant by virtue of

state law and made possible only because the wrongdoer was clothed with authority of state law. That is, a person having authority by law must use such authority to deprive another of his guaranteed rights. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 429. It is the nature of the act performed by a state official, not the status of a state official as such, that is determinative of the applicability of 42 U.S.C. §1983. Wainer v. Croft, 406 F. Supp. 717, 721 (W.D.Okla., 1975); Edwards v. Vasel, 349 F. Supp. 164, 166 (E.D.Mo., 1972); aff'd. 469 F.2d 338 (8th Cir. 1972). In testifying, the defendant was not using his official capacity -- not acting under color of law as that term is used in 42 U.S.C. §1983 --and his alleged false testimony

does not give rise to a cause of action under 42 U.S.C. §1983. Grow v. Fisher, 523 F.2d 875 (7th Cir., 1975); Stambler v. Dillon, 302 F. Supp. 1250 (S.D.N.Y. 1969); Pritt v. Johnson, 264 F.Supp. 167 (M.D. Pa. 1967); Smith v. Jennings, 148 F.Supp. 641 (W.D. Mich. 1957). In other words, the fact that the defendant was a police officer is not significant as his testimony was given not under color of his office but as any other witness of facts coming to his attention during the time he held such official position. Spires v. Bottorff, 223 F. Supp. 441 (S.D.Ind. 1963), affm'd. 7th Cir., 332 F.2d 179, cert. denied, 379 U.S. 938, 85 S. Ct. 343, 13 L.Ed. 2d 349, reh. denied, 379 U.S. 985, 85 S. Ct. 675, 13 L.Ed. 2d 579.

Moreover, under the law of Indiana, a witness who provides false testimony in the course of judicial proceedings is liable for a criminal action in perjury, but not for any civil action such as defamation or malicious prosecution since testimony in a judicial proceeding is privileged as a matter of public policy, whether perjurious or not. Hutchinson v. Lewis (1881), 75 Ind. 55; Baldwin v. Hutchinson (1893), 8 Ind. App. 454, 35 N.E. 711; Griffith v. Slinkard (1896) 146 Ind. 117, 44 N.E. 1001. In the Baldwin case, supra, the Court stated that:

> ". . .Public policy, and the safe administration of justice, require that witnesses, who are a necessary part of the judicial machinery, be privileged against any restraint, except that imposed by the penalty for perjury."

That same public policy also proscribes civil liability for false testimony under 42 U.S.C. §1983. Brower v. Horowitz, (3rd Cir., 1976), 535 F.2d 830; Hahn v. Sargent, 388 F. Supp. 445 (D. Mass, 1975).

Here, plaintiffs allege only that the defendant gave perjured testimony. Due process forbids the knowing use of perjured testimony by the prosecution to obtain a criminal conviction. Mooney v. Holohan 294 N.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). However, a person's constitutional rights are not violated simply because a witness may have testified falsely in his trial. McBride v. United States, 446 F. 2d, 229 (CA10, 1971). Allegations of perjury alone on the part of police officers are not sufficient to state a claim under 42

U.S.C. §1983. In Johnson v. State, 268 F.2d 803 (CA7, 1959), the plaintiff brought an action for damages under §1985 of Title 42, United States Code. He alleged that the defendants who were plaintiffs in a state action, their attorneys and witnesses, conspired through introduction of perjured and slanderous testimony to deprive him of equal protection in a state lawsuit. The Federal Court dismissed this action for failure to state a claim. Plaintiffs may not maintain this civil action for damages under 42 U.S.C. §1983 against the defendant for alleged perjury committed by him as a witness in a state court criminal trial. Liddell v. Smith, 345 F.2d 491, (CA7, 1965); Morgan v. Graham, 228 F.2d 625 (CA10, 1956).

For the reasons stated above, it is the opinion of this Court that plaintiffs' complaint must be DISMISSED for failure to state a cause of action under 42 U.S.C. §1983 for which relief can be granted.

It is, therefore, ORDERED that defendant's Motion to Dismiss be and the same is hereby GRANTED and plaintiffs' complaint is now DISMISSED.

ENTER: February 13, 1980

James T. Moody
Magistrate, U. S.
District Court

(82-C)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CHRIS P. VICKERS, SR. and JAMES N. BALLARD,	)	Entered: March 25, 1980
Plaintiffs,	)	
v.	)	CIVIL NO. H 79-140
SGT. JAMES W. HUNLEY, Individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,	)	
Defendant.	)	

MEMORANDUM DECISION

In accordance with §2 of the Federal Magistrate Act of 1979, Pub. L. No. 96-82, 26 CRIM. L. REP. 3001 (1979) (to be codified in 28 U.S.C. §636), appellants Vickers and Ballard have brought this matter before the Court. Messrs. Vickers and Ballard

appeal the Judgment of dismissal for failure to state a claim upon which relief can be granted entered against them by the United States Magistrate of the Northern District of Indiana. The Magistrate ruled that an allegation that a state police officer committed perjury while testifying as a witness in a state criminal trial states a cause of action neither under 42 U.S.C. §1983 nor under Indiana tort law against the state police officer when the officer is sued in both his individual and official capacities. It is this decision that the Court is asked to review.

Section 2 of the Federal Magistrate Act of 1979 requires that a judgment entered by a federal Magistrate and the Court must determine whether the Magistrate's dismissal of plaintiffs'

complaint for failure to state a claim upon which relief can be granted was proper. See Tankersley v. Albright, 514 F.2d 956, 966 (7th Cir. 1975).

Appellants, pro se, are state prisoners. At appellants' 1977 state criminal trial, appellee Sgt. Hunley appeared and testified as a witness for the state. By way of complaint made pursuant to 42 U.S.C. §1983, appellants alleged that:

> While under oath at a jury trial by Vickers and Ballard ... Sgt. James W. Hunley ... did willfully and contrary to his oath deliver before the jury false information pertaining to material facts present before that competent tribunal.
>
> Said testimony, being knowingly perjured, was calculated ana delivered only to prejudice and inflame the emotions of the jury against Vickers and Ballard, and ob-

> structed the fair administration of justice thereby denying Vickers and Ballard the benefit of their before-mentioned Constitutional Rights.

Appellants complained only that Hunley committed perjury as a witness at the state trial. When Hunley moved to dismiss for failure to state a claim, the Magistrate granted the motion and dismissed appellants' complaint. From this dismissal, an appeal is brought.

When a complaint's sufficiency is tested by a motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355

U.S. 41, 45, 46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The Court finds that the Magistrate properly applied the rule of Conley and that appellants' action was properly dismissed. The mere fact that the appellee was a witness in an action which itself was prosecuted under color of law does not make his testifying other than it was, i.e., the action of a private person not acting under color of law. Grow v. Fisher, 523 F.2d875, 879 (7th Cir. 1975). Appellants therefore have no actions under §1983.

Neither do appellants have actions in tort. Civil liability in tort for false testimony in judicial proceedings has long been proscribed as a matter of public policy. Foster v. Pearcy, ___ Ind.App. ___, 376 N.E.2d

1205, 1206 (1978); Baldwin v. Hutchinson, 8 Ind.App. 454, 35 N.E. 711 (1893).

The Court finds that appellants' complaint was properly dismissed for failure to state a claim upon which relief can be granted. Accordingly, the judgment of the Magistrate is AFFIRMED.

Enter: March 25, 1980.

Phil M. McNagny, Jr.
Judge, United States
District Court

(82-B)

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 27, 1981

Before

Hon. Walter J. Cummins,
Chief Judge
Hon. Robert L. Kunzig,
Judge
Hon. Richard D. Cudany,
Circuit Judge

CARLISLE W. BRISCOE, Plaintiff-Appellant,	) Appeal from the) United States) District Court for
No. 78-2378 vs.	) the Northern) District of Indiana,
SGT. MARTIN LAHUE, Defendant-Appellee.	) South Bend Division.) No. 78-C-139) Judge Alen Sharp
CHARLES TALLEY, JR. Plaintiff-Appellant,	) Appeal from the) Unites States) District Court for
No. 79 -1279 vs.	) the Northern) District of Illinois,
JAMES D. CROSSON, et al., Defendants-Appellees	) Eastern Division.) No. 78-C-2515) Judge Thomas R.) McMillen

CHRIS P. VICKERS, SR. and JAMES N. BALLARD, Plaintiffs-Appellants	) Appeal from the Unites States District Court for the Northern
No. 80-1484 vs.	) District of Indiana, Hammond Division.
SGT. JAMES W HUNLEY, Individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department, Defendant-Appellee.	) No. 79-C-140 Judge Phil M. McNagny, Jr.

The cause was heard on the records from the United States District Court for the Northern District of Indiana, South Bend Division, the Northern District of Illinois, Eastern Division, and the Northern District of Indiana,

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be,

and is hereby, AFFIRMED, in accordance with the opinion of the Court filed this date.

(82-E)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CARLISLE W. BRISCOE,	) Entered:
	) October 5, 1978
v.	) Civil Action File
	) No. S 78 0139
SGT. MARTIN LaHUE,	) Judgment

This action came on for ~~hearing~~ (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly ~~heard~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Summary Judgment is entered for the defendant, that the plaintiff take nothing by his complaint herein, and

that the action be dismissed on the merits.

Dated at South Bend, Indiana, this 5th day of October, 1978.

Richard E. Timmons
Clerk of Court

Eugene J. Szynski
Deputy Clerk

(82-D/1)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CHRIS P. VICKERS, SR., et al.	) Entered: February 13, 1980
vs.	) Civil Action File No. H 79-140
SGT. JAMES W. HUNLEY, et al.	) JUDGMENT

This action came on for trial (hearing) before the Court, Honorable James T. Moody, U. S. Mag., ~~United States District Judge,~~ presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiffs' complaint is now DISMISSED.

Dated at Hammond, Indiana, this 13th day of February, 1980.

_____
Clerk of Court

(82-D/2)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CHRIS P. VICKERS, SR. and JAMES N. BALLARD	Entered: March 27, 1980
vs.	Civil Action File No. H 79-140
SGT. JAMES W. HUNLEY, Individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department	JUDGMENT

This action came on for ~~hearing~~ consideration of Notice of Appeal before the Court, Honorable Phil M. McNagny, Jr., United States District Judge, presiding, and the issues having been duly ~~tried~~ ~~heard~~ and a decision having been duly, rendered,

It is Ordered and Adjudged that appellants' complaint was properly

dismissed for failure to state a claim upon which relief can be granted. Accordingly, the judgment of the Magistrate is AFFIRMED.

Dated at Hammond, Indiana, this 27th day of March, 1980.

_____
Clerk of Court

Copy to:
Christopher P. Vickers, Sr.
James Norman Ballard
William T. Enslen
Lowell E. Enslen
Peter G. Koransky

(82-D/3)

Joint Appendix

No. 81-1404

MAY 18 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARLISLE W. BRISCOE,

Petitioner,

v.

MARTIN LAHUE,

Respondent.

CHRIS P. VICKERS, SR. and JAMES N. BALLARD,

Petitioners,

v.

JAMES W. HUNLEY, individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 25, 1982.
CERTIORARI GRANTED MARCH 22, 1982.

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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Briscoe v. *LaHue*

1978

July	6	Complaint of Carlise W. Briscoe filed.
Aug.	16	Memorandum In Support of Complaint of Carlisle W. Briscoe with attached Plaintiff's Exhibits "A", "B", and "C" filed.
Aug.	23	Motions In Lieu Of An Answer filed.
Sept.	7	Motion In Traverse In Lieu Of Answer filed.
Sept.	13	Order directing Briscoe To Amend Pleading with a More Definite Statement Entered.
Sept.	22	In Re Of Motion For More Definite Statement filed by Carlisle W. Briscoe.
Sept.	28	Motion To Dismiss, and Motion For Summary Judgment and Memorandum In Support Of Motion For Summary Judgment filed.
Oct.	3	Memorandum and Order Granting LaHue's Motion For Summary Judgment Entered.
Oct.	5	Judgment Order Entered In District Court.
Oct.	18	Notice Of Appeal To The United States Court Of Appeals For The Seventh Circuit filed.
Oct.	30	Appeal Docketed.

1980

Aug.	22	Brief of Carlisle W. Briscoe filed.
Oct.	2	Brief of Martin LaHue filed.

1981

Jan.	17	Reply Brief of Carlisle W. Briscoe filed.

1981

Jan. 20 Oral Argument.

Oct. 27 Opinion and Judgment Of The United States Court of Appeals for the Seventh Circuit Affirming Judgment of the District Court for the Northern District of Indiana, South Bend Division, entered.

Vickers and Ballard v. *Hunley*

1979

Mar. 5 Complaint filed; Plaintiff's First Interrogatories filed.

Mar. 26 Subpoena to Keepers of Records for Cedar Lake, Indiana Police Station and Crown Point, Indiana Medical Center issued.

May 10 Answer filed.

May 18 Motion For Leave To Respond filed by Plaintiffs.

May 23 Reply to Answer filed by Plaintiffs.

July 17 Answers to Plaintiffs' First Interrogatories filed.

July 20 Request For Admission filed by Plaintiffs.

Aug. 30 Answer To Plaintiffs' Request For Admission filed.

Oct. 16 Motion To Produce Materials Relevant To This Action with Attachments filed by Plaintiffs; Motion To Admit Unobtained Documents filed by Plaintiffs.

Oct. 31 Consent To Trial of Jury Case By United States Magistrate filed by Plaintiffs.

Nov. 23 Motion to Dismiss and Memorandum in Support filed.

Dec. 4 Response To Defendant's Motion To Dismiss and Memorandum filed.

Dec. 27 Notice Re Reference to Magistrate filed.

1980

Jan. 4 Consent to Trial by Magistrate filed by Defendant.

1980

Jan. 7 Order of Reference to Magistrate filed.

Feb. 13 Order of United States Magistrate James T. Moody Granting Defendant's Motion to Dismiss and Judgment Thereon entered.

Feb. 21 Notice of Appeal To District Court filed by Plaintiffs.

Mar. 25 Memorandum Decision of District Judge Phil M. McNagny Affirming Decision of Magistrate Moody entered.

Mar. 27 Judgment Under Judge McNagny's Decision entered.

Apr. 2 Notice of Appeal filed.

Apr. 15 Appeal Docketed.

Aug. 22 Brief of Vickers and Ballard filed.

Oct. 2 Brief of Hunley filed.

1981

Jan. 17 Reply Brief of Vickers and Ballard filed.

Jan. 20 Oral Argument.

Oct. 27 Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit Affirming Judgment of the District Court for the Northern District of Indiana, Hammond Division, entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CARLISLE W. BRISCOE

v.

SGT. MARTIN LAHUE

COMPLAINT

(Filed July 6, 1978)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES (X) NO ( )

B. If your answer to A is yes, describe the action in the space below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the action: Briscoe & McFarland
2. Court (if federal court, name the district; if state court, name the county): Northern District of Indiana
3. Docket number: S-78-0082
4. Name of judge who heard case: Pending
5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?) Still Pending

If you are imprisoned in a state penal institution, then answer C: 1, 2 & 3.

C. 1. Did you present this complaint to the state prison grievance procedure?

YES ( ) NO (X)

2. If your answer is yes, what was the result?

_____

_____

3. If your answer is no, please explain.

They have no jurisdiction.

_____

_____

PARTIES

(Place your full name in the first blank in paragraph 1. In the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The plaintiff is Carlisle W. Briscoe #11270
2. Plaintiff's address is P.O. Box 41
   Indiana State Prison
   Michigan City, Indiana
   #46360

CAUSE OF ACTION

D. I allege that the following of my constitutional rights, privileges or immunities have been violated.

Allegation 1: Violation of fourteenth Amendment denied due-process.

Allegation 2:

Allegation 3:

E. The following facts form the basis for allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words—but do not make legal arguments or citations).

Allegation 1: Sgt. Lahue knowingly and willfully submitted before the jury on or about March 23, 1977 false testimony and

evidence concerning a false three (3) point fingerprint knowing that this print was refuted by the F.B.I. crime lab, as of no value concerning the print of the plaintiff.

(If you need more space to explain any allegation or to list additional facts, use the other side of this sheet or attach an additional sheet.)

F. REQUEST FOR RELIEF

1. I DO request that I be allowed to commence this action without prepayment of fees and costs, or security therefor, pursuant to 28 U.S.C. § 1915. The affidavit of indigency below has been completed and is submitted in support of this request for leave to proceed in forma pauperis.
(do, do not)

2. I believe that I am entitled to the following relief:

(A) To grant a permantnt injunction prohibiting the defendant from violating the fourteenth amendment rights of the plaintiff;

(B) To hold an open court hearing to bring criminal charges against said defendant.

(C) To grant the plaintiff $100,000.00 in damages.

/s/ Carlisle W. Briscoe
(Signature)
P. O. Box 41
Michigan City, Indiana
#46360
(Address)

AFFIDAVIT

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

Before me the undersigned in and for the said County and State of Indiana presently appeared Carlisle W. Briscoe, plaintiff in the within action who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

/s/ Carlisle W. Briscoe
(Signature of affiant-plaintiff)

Subscribed and sworn to before me this 23rd day of June, 1978

/s/ James M. Lustamer
Notary Public or other authorized
to administer oaths by law

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND, DIVISION

Cause No. S78-0139

(Caption Omitted In Printing)

MEMORANDUM IN SUPPORT OF COMPLAINT

(Filed August 16, 1978)

Comes now the plaintiff, Carlisle W. Briscoe, pro-se pursuant to 28, U.S.C.A. § 1343(3).

Does now submit his memorandum in support of complaint.

JURISDICTION

Jurisdiction of this court is envoked pursuant to 28, U.S.C.A. § 1343(3), which provides jurisdiction of this court in all suits authorized by 42, U.S.C.A. § 1983, to redress deprivation under the color and dress of state law, of violations of privileges or immunity secured by the constitution of the United States, or an act of congress that provides for equal civil rights for all persons within the jurisdiction of the United States of America.

Jurisdiction is further envoked by this court pursuant to 28, U.S.C.A. § 2201 and 2202 which provides for original jurisdiction of this court in all cases wherein an actual case or controversy exist to enter declaratory judgment declaring the rights and legal relations of parties to the action.

VENUE

This court does have the proper venue pursuant to 28, U.S.C. 1392(A):

Plaintiff's action is for declaratory and injuctive relief pursuant to 42, U.S.C.A. § 1983, since this action is

brought to redress deprivation under the color and dress of state law, rights, privileges and immunities secured by the constitution of the United States of America and its laws more specifically the Fourteenth Amendment to the United States constitution:

The matter of controversy is the plaintiff Carlisle W. Briscoe seeking damages of one hundred thousand dollars ($100,000.00) pursuant to 28, U.S.C.A. § 1331:

PARTIES TO THE ACTION

PLAINTIFF: The plaintiff Carlisle W. Briscoe is an inmate of the Indiana State Prison at Michigan City, Indiana, being in said prison since the 22nd day of May 1977.

DEFENDANT: The defendant sgt. Martin Lahue is a police sgt. on the Bloomington Police department, Bloomington, Indiana:

STATEMENT OF FACTS

FOREWORD: The plaintiff states that the defendant Sgt. Martin Lahue, did knowingly and willfully submit before the jury false testimony and evidence concerning a false three (3) point fingerprint.

Knowing that this print was refuted by the F.B.I. crime lab as of no value, concerning the print of the plaintiff.

This occuring in the Monroe County Superior Court No. 1, on the 23rd day of March 1977;

In support of the above allegation the plaintiff would show this Court the following:

(1) That on the 28th day of Sept. 1976, the defendant testified at a probable cause hearing held in Monroe Superior Court no. 11

QUOTE:

> IT's my opinoin that this is the same section that exist on the right thumb of Carlisle Briscoe; George

Abbotts of the Indiana State police says it's the same:

(see exhibit "A" P. C. s76-P. C.125 (2)-page #24)

(2) That on the 4th day of Oct. 1976, the plaintiff was arrested on the following charges;

(A) Conspiracy to commit first degree burglary:

(B) Conspiracy to commit assault and battery with intent;

(3) On the 2nd day of November 1976, the defendant Lahue received an F.B.I. crime lab report; stating the following:

NO LATENT PRINTS OF VALUE ARE PRESENT ON THE LIFT:

(see exhibit "c" trial transcript page #1130)

(4) On the 7th day of Feb, 1977, while the plaintiff was incarcerated in jail, he was charged with the following also:

(a) First degree burglary

(b) Assault and battery with intent to kill:

(5) The plaintiff states that the only evidence of the alleged crime of first degree burglary was a purported (3) point fingerprint submitted by the defendant Lahue. Besides this latent print being totally untrustworthy under the teachings of the science of fingerprint comparison, was actually total contravention of the basic premises and tenenments of the science of fingerprint identification;

The defendant Lahue testified before the jury as to the probability of the latent being that of the plaintiff, and so stated that it was probable that it could be anyone of 50 to 100 different people with the same char-

acteristics, in Monroe County Indiana. The defendant concluded his testimony with the following:

"Q. What is the sum and essence of your testimony today, Sgt. Lahue?

"A. Well, the sum and essence of it would be that the probability, even though it does have only three points, the probability of that being anyone else in Bloomington there probably wouldn't be over fifty to one hundred people who may have that same characteristics.

"Q. In that same section?

"A. That same section, yes sir".

(see exhibit "C" trial transcript page #1125)

(7) The plaintiff states that on the 17th day of November 1977, a second probable cause was issued in the Monroe County Superior Court no. 11. In this probable cause the defendant makes two (2) contradictory statements, as follows:

The Federal Bureau of investigation returned it and stated that there was insufficient points on the latent for them—you know—to make a comparison on. The State police was likewise; The State Police like to have somethinglike eleven points, I believe and I imagine that the F.B.I. is basically the same:

(see exhibit "B" S77 PC5 (2) page #10)

SPECIAL CONCLUSIONS OF LAW

The Defendant Sgt. Martin Lahue did make false declarations and statements before, during and after the trial of the plaintiff, to a material fact (a fingerprint). This being done while being duly sworn and under oath. Then testifying in the presence of a jury willfully to a material fact knowing that it was false, when the fingerprint had been refuted by the F.B.I. as of no value.

The actions of the defendant does constitute perjury a violation of Title 18, U.S.C.A. § 1621.

In support of this allegation, the plaintiff would show this court the following:

(1) N.Y. 1977. Materiality is essential element of crime of perjury in the first degree; false swearing, to be material, must reflect on matter under consideration during action or proceeding in which it is made:

(PEOPLE v. STANDARD, 396 N.Y. S2d. 825, 42 N.Y. 2d 74, 365 N.E.2d 857)

(2) C. A. MASS. 1965 Testimony in perjury prosecution as to falsity of statements made by defendant in criminal trial was sufficient to allow jury to reasonably infer that defendant had made statements to with intent to falsify.—18 U.S.C.A. § 1621:

(LA PLACA v. U.S., 354 f2d. 56 certiorari denied 86 S.CT. 932, U.S. 927, 15 LED 2d 846)

(3) O. R. APP. 1977. Perjury statutes do not require verbatium pleading of false testimony. (STATE v. HYDE, 561 P2d. 659)

(4) The defendant did knowingly and willfully give false testimony relating to a material matter, (a fingerprint).

C.A. TEX. 1971. "Perjury" is knowingly and willfully giving false testimony relating to a material matter. (U.S. v. Marcello, 436 F2d. 1221, certiorari denied 91 S.CT. 1231 401 U.S. 1003, 28 L.ed. 2d. 539)

C.A. N.Y. 1956. In prosecution for perjury, evidence sustained finding that defendant knew the statement he was charged with having falsely made, was false. (U.S. v. Flores-Rogriguez, 237 F2d. 405.)

(5) The plaintiff can prove, if need be by circumstantial evidence, that at the time of the defendant's testimony of the material matter of the fingerprint, that he did know it to be false.

(C.A. ILL. Whether defendant knew at time he testified that his statements were false maybe proven by circumstantial evidence.

(U.S. v. Devitt, 499 F2d. 135, certiorari denied 95 S. CT. 1974, 421 U.S. 975, 44 LED.2d 466)

C.A. MASS. 1965. Testimony in perjury prosecution as to falsity of statements made by defendant in criminal trial was sufficient to allow jury to reasonably infer that defendant had made statements with intent to falsify. (18, U.S.C.A. § 1621

(La Placa v. U.S., 354 F2d. 56, certiorari denied 86 S.CT. 932, 383 U.S. 927, 15 L.E.D.2d. 846)

C.A. Ohio. 1958. Evidence established criminal intent of defendant in testifying to a willful falsehood sufficient to establish perjury.

(Speth v. U.S., 254 F2d. 924 certiorari denied 79 S.Ct. 52, 358 U.S. 831, 31, E. D. 69)

(6) Perjury is one of the most serious offences known to law.

(U.S. v. Levy 533 F2d. 969)

C.A. G. 1976. Essentially anything that could influence or mislead trial court or jury is considered to be material, for the purpose of perjury prosecution. (18 U.S.C.A. § 1623)

(U.S. v. Whimpy, 531 F2d. 768)

(7) The plaintiff states that the defendant did abuse his police powers in testifying to a fact of a fingerprint knowing that it was false. In doing so denied the plaintiff a fair and impartial trial that is afforded him under the Fourteenth Amendment.

The Fourteenth Amendment:

The police power is the power to enact laws to promote the order, safety, morals, and general welfare of society. (Jack Lincoln Shops v. State Dry Cleaners Board, 1943,

P2d. 332, 192, okl. 251, appeal dismissed, 63 S. Ct. 1448, 320 U.S. 208, 87 L.E.D. 1847)

To deny a citizen his rights guaranteed by this clause is not a competent or proper exercise of the police power, and hence no State can deprive any person of life, liberty without due-process of law. (New Orleans v. Le Blanc, 1915, 71 so. 248, 139 LA. 113)

(8) Provisions of this section that the falsity of a declaration shall be established sufficient for conviction of perjury by proof that defendant while under oath made irreconcilably contradictory declarations material to point in question in any proceeding before grand jury or court.

(U.S. v. Lee, C.A. N.Y. 1975, 509 F2d. 645, stay denied 95 S.Ct. 1653, 421 U.S. 927, 44 L.E.D. 2d. 85, certiorari denied 95 S. Ct. 2645)

C.A. D.C. 1951. Instruction that "perjury" is simply the giving of false testimony under oath, testimony that a party does not believe to be true, and that if he testifies before a competent tribunal as to a fact which is false, and he does not believe it to be true, then that is "perjury" was sufficient, though court did not define in terms the word "willfully".

(D.C. CODE. 1940 § 22-2501)

(Maragon v. U.S., 187 F2d. 79, 87 U.S. APP. D.C. 349, certiorari denied 71 S.Ct. 804, 3 41 U.S. 932, 95 L.E.D. 1361)

IN CONCLUSION

The plaintiff, Carlisle W. Briscoe, does state a claim upon which relief is sought;

The defendant Sgt. Martin Lahue of the Bloomington Police Dept., Bloomington, Indiana, did on several different occasions make certain contradictory and irreconcilably statements before, during and after trial of the

plaintiff, in the Monroe County Superior Court No. 1 Bloomington, Indiana, on the aforesaid dates;

The defendant's statement of: ——There was insufficient points to make a comparison. When it was stated by the F.B.I. that: ——the latent print was of no VALUE. Is to say the least contradictory and irreconcilably and a false declaration.

Therefore testifying to the fact of the print under oath, knowing that this print was refuted by the F.B.I. as of no VALUE, the defendant did then and there commit perjury a violation of Title 18, U.S.C.A. § 1621.

Thereby hampering the plaintiff's right to a fair and impartial trial and due-process of law, that is afforded him under the Fourteenth Amendment to the United States constitution.

"PERJURY" TITLE L, U.S.C.A. § 1621

Willful violation of the obligation imposed by an oath, by affirmation or other lawful substitute for an oath, by giving false testimony or making false declarations or statements in a judicial proceeding or other proceeding authorized by law.

C.A. OR. 1976. Evidence of materiality of a false inconsistent statement is requirement of perjury conviction, but evidence need not be material to the main issue nor requirement merely necessitates that false declaration have a tendency to influence, impede, or hamper tribunal from pursuing its investigation. (18 U.S.C.A. § 1623

(U.S. v. Arfield, 539 F2d. 674)

WHEREFORE: The plaintiff, Carlisle W. Briscoe, ask this Court, the United States District Court, to examine the attached plaintiff's exhibit's "A", "B", "C". In doing so, to examine and view closely, under close scrunity the aforesaid.

Further the plaintiff ask this Court to hand down judgement in favour of the plaintiff, and to grant relief sought in complaint.

(A) To grant a permanent injunction prohibiting the defendant from violating the Fourteenth Amendment rights of the plaintiff:

(B) To hold an open court hearing, to bring criminal charges against said defendant:

(C) To grant the plaintiff $100,000.00 in damages:

Lastly to grant the plaintiff attorney fee's, to be paid by the defendant, and all other relief just and proper. That this be done in the interest of justice:

Respectfully submitted

/s/ Carlisle W. Briscoe
CARLISLE W. BRISCOE
Plaintiff—Pro Se
Carlisle W. Briscoe #11270
P.O. Box-41 (ach)-(a29)
Indiana State Prison
Michigan City, Indiana #46360

C.W.B.

NOTARY

Subscribed and sworn to before me a notary public this 14 day of August 1978.

/s/ Raymond J. Bloomer
RAYMOND J. BLOOMER
Notary Public

My Commission Expires February 5, 1982

(Certificate of Service omitted in printing.)

PLAINTIFF'S EXHIBIT "A"

IN THE MONROE SUPERIOR COURT II

Probable Cause No. S76-PC125(2)

STATE OF INDIANA)
) ss:
COUNTY OF MONROE)

IN THE MATTER OF FINDING PROBABLE CAUSE FOR ISSUANCE OF A WARRANT FOR THE ARREST OF

PHILLIP HARTMAN

AND

CARLISLE BRISCOE

TRANSCRIPT

STATE OF INDIANA:

BARRY S. BROWN
Prosecuting Attorney
Monroe County
Bloomington, Indiana

ALSO PRESENT:

MARTIN LAHUE
Bloomington Police Department
Bloomington, Indiana

[1] JUDGE BRIDGES: This is S76-PC 125(2), in the matter of finding probable cause for the issuance of a warrant for the arrest of Phillip Hartman and Carlisle Briscoe, Jr., each on three counts, (1) being Conspiracy to Commit Assault and Battery With Intent to Kill, (2) being Conspiracy to Commit Second Degree Arson and (3) being Conspiracy to Commit First Degree Burglary.

MARTIN LAHUE, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

BARRY S. BROWN: DIRECT EXAMINATION:

Q. Would you state your full name for the record?

A. Yes; it's Martin LaHue.

Q. And the prospective defendant, Carlisle Briscoe, is that Carlisle Briscoe, Jr.?

A. Yes, it is.

Q. Are you the same Martin LaHue who appears as an affiant in the three Informations that are now before the Court for consideration?

A. Yes, I am.

* * * * *

[23] Q. And while at the scene, did you conduct an investigation?

A. Yes, we did; Sergeant Kuster handed me a piece of glass from the door of the trailer, and on this glass there was a partial fingerprint, and I took the piece of glass back to the department and raised the fingerprint, photographed the latent fingerprint, and also checked the fingerprint card of Cariisle Briscoe, and found that it was a section of the right thumb of Carlisle Briscoe.

BROWN: How certain are you that that is one and the—[24] those fingerprints do coincide and do belong to Carlisle Briscoe?

A. It's my opinion that this is the same section that exists on the right thumb of Carlisle Briscoe; also Technician George Abbotts of the Indiana State Police said it's the same.

Q. You received training and schooling in the area of fingerprinting, then?

A. Yes, I have.

Q. Approximately how many—what sort of training?

A. One week classification, one week comparison.

Q. This would be the Federal Bureau of Investigation?

A. Yes, it was.

Q. And approximately how many points would that occasion you to have, once completed?

A. At least eight, possibly more.

* * * * *

[29] Q. And you have Briscoe's print from the McFarland residence?

A. His right thumb; yes, sir.

MR. BROWN: That concludes the evidence in all three matters.

* * * * *

PLAINTIFF'S EXHIBIT "B"

IN THE MONROE SUPERIOR COURT II

Probable Cause No. S77-PC5(2)

STATE OF INDIANA)
) ss:
COUNTY OF MONROE)

IN THE MATTER OF FINDING PROBABLE CAUSE FOR ISSUANCE OF A WARRANT FOR THE ARREST OF

PHILLIP HARTMAN

AND

CARLISLE BRISCOE

TRANSCRIPT

STATE OF INDIANA:

BARRY S. BROWN
Prosecuting Attorney
Monroe County
Bloomington, Indiana

ALSO PRESENT:

MARTIN LAHUE
Bloomington Police Department
Bloomington, Indiana

[1] JUDGE DOUGLAS R. BRIDGES: This is S77-PC5(2), in the matter of finding probable cause for the issuance of warrants for the arrest of Phillip Hartman and Carlisle Briscoe, each on a charge of First Degree Burglary, Assault and Battery With Intent to Kill, and Attempted Commission of a Felony While Armed.

MARTIN LaHUE, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

MR. BARRY S. BROWN: DIRECT EXAMINATION:

Q. Would you please state your full name for the record?

A. Martin LaHue.

Q. And your present occupation?

A. Detective Sergeant for the City of Bloomington Police Department.

Q. Are you the same Martin LaHue that has on this date signed an Information alleging that Philip Hartman and Carlisle Briscoe committed the offenses of First Degree Burglary, Assault and Battery With Intent to Kill, and Attempted Commission of a Felony While Armed?

A. Yes, I am.

Q. Will you state for the Court—are you the same Marty LaHue who also appeared in this court on or about the 4th day of October, 1976, with regard—at a probable cause hearing, at which time conspiracy charges to [2] commit Assault and Battery with Intent to Kill, and to commit First Degree Burglary—evidence was also heard and charges were filed?

A. Yes, I am.

* * * * *

[9] Q. O.K. And was there an investigation made at the mobile home?

A. Yes, there was.

Q. As a matter of fact, was there a breaking and entering?

A. Right; there was. The glass was broken out of the door allowing the subject or subjects to reach in, unlock the door, and enter the trailer. The trailer had been entered, and a dog, a Boston terrier, that was the property of Frederick McFarland, was taken from the trailer.

Q. Of what approximate value was that Boston terrier? Was it over $100.00?

A. Yes, I would say so, yes.

Q. Were there any miscellaneous physical evidence seized at the scene?

[10] A. Yes; Sergeant Kuster of the State Police, handed me a piece of glass that had a partial latent fingerprint; I took the glass to the police department and dusted it and removed a latent print from the glass. Shortly after removing it from the glass, I compared it with the known prints of Carlisle Briscoe, that we have at the Police Department, and found that the—a section—the latent print, which is a section of a rolled impression was identical to a section in the upper right area of Carlisle Briscoe's rolled print, which we have on file.

Q. Now, did you attempt to have the same print examined by both the Federal Bureau of Investigation and the Indiana State Police?

A. Yes, I did.

Q. What was their response?

A. The Federal Bureau of Investigation returned it and stated that there was insufficient points on the latent for them—you know—to make a comparison on.

Q. So they didn't even attempt a comparison?

A. No.

Q. Did the State Police?

A. No; the State Police was likewise; the State Police likes to have something like eleven points, I believe, and I imagine that the FBI is basically about the same.

[11] Q. What is your training and background in fingerprint analysis?

A. I've had basic fingerprint classification; then I've had advanced fingerprint classification and comparison, fingerprint techniques, both from the FBI.

* * * * *

PLAINTIFF'S EXHIBIT "C"

[1096] MARTIN LaHUE, being first duly sworn to testify to the truth, the whole truth and nothing but the truth, testifies as follows:

DIRECT EXAMINATION: BARRY BROWN

Q. Marty, will you state your full name for the record please?

A. Yes. It's Martin LaHue.

Q. And your present occupation?

A. Detective sergeant with the City of Bloomington Police Department.

Q. For how long have you been employed there?

A. Approximately eleven years.

Q. Marty, what are your duties at the police department?

A. I'm in, assigned to the forensics unit of the Bloomington police department. That covers everything from narcotics investigation, surveillance, some felony cases; our police lab is handled through the forensics unit.

Q. Are you associated with any particular area of specialty, Marty?

A. Yes, I am. Evidence processing, polygraph technician, fingerprint.

* * * * *

[1106] Q. Sgt. LaHue, let me ask you this question. Did you investigate at any time the burglary, the alleged burglary, of the mobile home?

A. Yes, I did.

Q. At Arlington Valley?

A. Yes, sir.

Q. Do you recall the date of that investigation?

A. That was on the twenty-seventh of September.

Q. Was it on the twenty-seventh?

A. I believe it was on the twenty-seventh or early morning of the twenty-eighth.

Q. When did you conduct the investigation yourself?

A. Well, after the surveillance on that particular night I received a call from Sgt. Webb and she stated that she'd received a call from the Flynns, one of the Flynn girls, who advised her that, apparently, someone had broken into Mr. McFarland's trailer and had taken the dog.

Q. Did you go to that location yourself?

A. Yes, sir. Sgt. Webb and I went to the location.

Q. Now while at the location, did you conduct an investigation?

A. Yes, sir. Went to the location, we were met there by Sgt. Baker and Sgt. Kuster at the time.

Q. What did you see? Could you describe what you saw at [1107] that time?

A. Yes. The glass had been broken out of the trailer door and there was a stand that had been turned over. And we observed too that the dog was not in the trailer.

Q. Did you seize any evidence at that scene, Sgt. LaHue?

A. Yes, sir. Sgt. Kuster gave me a piece of glass that had a partial fingerprint on it, on the glass.

Q. What did you do with that specimen once you received it?

A. Shortly after we cleared from there Sgt. Webb and I went to the police department and I dusted the glass for a latent fingerprint and was successful in removing a partial latent from the glass.

Q. Sgt. LaHue, have you had any experience at all in fingerprinting?

A. Yes, I have.

Q. Would you specify for the Jury the training that you've received, if any, and the schooling that you've received, if any?

A. I've received one week fingerprint classification conducted by the FBI; also one week of fingerprint comparisons conducted by the FBI.

Q. With regard to your first week of school, when did you attend that school, receive that instruction?

A. I think it was sixty-nine or seventy.

Q. And where was that class given?

[1108] A. It was in Indianapolis.

Q. The instructors were from?

A. The FBI.

Q. And it dealt specifically with what subject?

A. With classification of fingerprints.

Q. What was the nature of that instruction, just very generally, briefly.

A. It was for the purpose of classifying fingerprints for the purpose of filing.

Q. Were you given an examination following that, of sorts?

A. Yes, we had to classify several fingerprint cards for the purpose of filing.

Q. Do you want to share with us how well you did on that exam?

A. I really don't recall.

Q. Did you receive a certificate from that school?

A. Oh, yes. Yes, sir, I did.

Q. You testified you had received a second week of instruction from the FBI as well; is that correct?

A. Yes, sir, that's true.

Q. And where was that?

A. It was out at IU.

Q. And do you recall the time, the date?

A. I believe it was seventy-two, 1972.

Q. And, specifically, what did that class deal with?

[1109] A. It consisted of comparison of fingerprints and . . .

Q. Briefly, what is the essence of comparison; what is required and what is the substance of that instruction?

A. Well, it was, it was comparison of not only fingerprints but palm prints and in classification, of course, you come up with a numerical number and this is how

they're filed; but in classification the characteristics of a particular fingerprint is used for comparison as opposed for classification.

Q. Now, you talk about qualifying characteristics or characteristics of fingerprints, what are you referring to when you use that term, Sgt. LaHue?

A. I'm referring to bifurcations such as the; in the fingerprints there's an area known as the core, an area known as the delta, depending upon what type of particular fingerprint it is; and there are separations of the lines from the fingerprint which is called bifurcations; and any characteristics such as these are what's considered in comparison of the fingerprint and these are considered in relationship to ridge counts between the two areas, the two bifurcations, etc.

Q. Now by comparison do you mean, Sgt. LaHue, that the science is so advanced that you can take a fingerprint off of a piece of glass, for example, an unknown fingerprint, and compare those and come up with certain proof that those are the same fingerprint?

[1110] Yes. Yes, you can.

Q. What if you've got, how many qualifying characteristics does it take to get over the hump, so to speak, or is there any arbitrary figure?

A. Well, there is no arbitrary figure. There's a, there's policy type figures, such as I believe the State Police requires eleven points, and this is where they just totally depend upon the fingerprint being the only evidence probably that they'd had.

Q. When you talk about points, are you talking about distinct identifying characteristics of one print?

A. Yes, on one latent print compared with the rolled impression of the suspect.

Q. Is it possible for, say example the, for example the State Police or any other agency to look at a fingerprint that has fewer than eleven points?

A. Is it possible for them to . . .

Q. Will they do that?

A. Not, not necessarily, they won't; in fact, they generally say, well, there's not enough points here in this particular latent to go to court and win a case solely on that fingerprint, and this is in essence what they're saying. And this is also the policy of the FBI.

Q. In addition to those two weeks of schooling that you received, have you received any other courses or taken [1111] any other courses or schooling?

A. Yes, I went to the FBI Academy at Quantico for forensic photography, and we dealt quite a bit with fingerprints there also. That was a two week course.

Q. Did you receive a certificate for that?

A. Yes, sir, I did.

Q. And did you receive a certificate from the comparison course?

A. Yes, sir, I did.

Q. In addition to the schooling that you're received, Sgt. LaHue, have you examined any fingerprints practically. You've had this classroom instruction, I believe, beginning in the late sixties and early seventies; have you had any practical applications?

A. Yes, sir, I have probably classified something like six thousand fingerprints and I've probably compared two hundred fifty-three hundred fingerprints.

Q. Have you ever testified in court, for example, on a probable cause hearing dealing with . . .

A. Yes, I have.

Q. Has your testimony, to the best of your knowledge, been accepted by the court on these occasions?

A. Yes, it has.

Q. How many times have you so testified, let's start with probable cause hearings:

[1112] A. I don't know off the top of . . .

Q. It would be difficult to estimate?

A. Yes, sir, it would.

Q. More than a dozen, less than a dozen?

A. Probably a dozen, something like that.

Q. Have you had an occasion to testify in court prior to this occasion dealing with comparison of fingerprints?

A. I'm not sure if I have on fingerprints or not. It seems like I did but it's been sometime ago.

Q. It's been not within the last several years?

A. No, no, it hasn't.

Q. Sgt. LaHue, you testified that you did seize a fingerprint at the scene that was handed to you by Sgt. Kuster; is that correct?

A. Yes, sir.

Q. What did you do with that item or that piece of glass once you returned to the station?

A. I dusted the print and photographed it, and we pulled the fingerprint card of Carlisle Briscoe and we found that the same . . .

Q. Before you get to that point, Sgt. LaHue, I'm going to hand you what has been marked for purposes of identification as State's Exhibit No. 39 and ask you to describe for this jury what you're now holding in your hand. That's a small brown envelope, is it not?

[1113] A. Yes, it is.

Q. And you've now opened it; what is inside of it?

A. This is the impression, I'm sorry, this is the latent fingerprint that I'd removed from the glass that Sgt. Kuster had given me. This is a No. 1 lift which would be the first lift, and then I also dusted the same latent again and took a second lift which would be the No. 2 lift. Then also there was an area on the glass where it had been touched but there wasn't anything worthwhile so far as comparison.

Q. Now, do you still have the piece of glass from which the latent was removed, Sgt. LaHue?

A. No, sir, I do not.

Q. Is it customary for you to lift the print and then retain the other piece of glass with the items which were seized, or not?

A. No, sir, it is not.

Q. So it's your testimony that, I'm going to need my envelope back again.

A. I'm sorry.

Q. That State's Exhibit No. 39 is the print as it has been lifted off the glass?

A. Yes, it is.

Q. I hand you what has been marked for purposes of identification as State's Exhibit No. 40 and ask you if [1114] you can identify that.

A. Yes, this is the fingerprint card of Carlisle Briscoe.

Q. And from which department or agency has it been taken?

A. From the Bloomington police department.

Q. And can you certify and testify that that those are his fingerprints?

A. Yes, they are.

Q. And when were they made?

A. In August of sixty-nine by Officer Brad Meadows.

Q. Is this a part of regular documents and records that are kept within the Bloomington police department?

A. Yes, sir, it is.

Q. Do fingerprints change over the years if that was taken in 1969?

A. No, sir, they do not.

Q. They remain pretty much the same?

A. Yes, sir, they do.

Q. Unless you pour acid or something on them, right?

A. Even with acid they still remain the same.

Q. Now what is your process once you've removed, lifted the fingerprints, I believe is the word that you used, and you photographed that, is that correct?

A. Yes, sir.

Q. And that was the exact size of those fingerprints, correct?

[1115] A. Yes, sir.

Q. What is your next process in comparison?

A. Okay. We pulled the fingerprint card of Carlisle Briscoe and found that the . . .

Q. Before you get into your conclusion though, what is your next procedure in, I assume . . .

A. That would be the next procedure, of course, so as to compare that latent with the suspect's fingerprints.

Q. Now as far as classification is concerned, were you able to classify or how did you classify the prints removed from the broken piece of glass at the trailer?

A. They weren't, they were not classified. The latent were not classified due to the amount of points and also the limited area of the film that they were made from.

Q. Did you make a comparison, however?

A. We made a comparison, yes, sir.

Q. As to State's Exhibit No. 39 once again which consists of three parts, apparently, are these photographs true and accurate representations and portrayals of fingerprint specimen that you removed from the piece of glass taken and seized at the trailer at Arlington Park that was broken into on the twenty-eighth?

A. Yes, sir, they are.

Q. Your Honor, at this time the State would move the [1116] admissibility of State's Exhibit 39 in three parts. I'll show them to Mr. Briscoe at this time.

Mr. Briscoe: No objection, your Honor. No objection.

The Court: State's Exhibit No. 39 is considered as introduced into evidence and read into the evidence and may be exhibited to the Jury.

Q. Your Honor, at this time the State seeks to introduce into evidence State's Exhibit No. 40. I will show that to Mr. Briscoe.

Mr. Briscoe: No objection.

The Court: State's Exhibit No. 40 may be considered as introduced into evidence and read into the evidence and may be exhibited to the Jury.

Q. Now, Sgt. LaHue, did you make displays or charts for purposes of this trial with regard to these photographs?

A. Yes, sir.

Q. I'll hand you now what's been marked for purposes of identification as State's Exhibit No. 41 and ask you to identify that for the record please.

A. Yes, sir, this is the right thumb print of Carlisle Briscoe from the fingerprint card.

Q. Would you feel free to classify that as a known print of Carlisle Briscoe?

A. Yes, sir. Yes.

Q. And that's taken off of the fingerprint card that's [1117] been previously introduced into evidence; is that correct?

A. Yes, sir, that's correct.

Q. As to State's Exhibit No. 42, what is that?

A. This is a blow-up of the latent print that was recovered from the glass given to me by Sgt. Kuster.

Q. Now both State's Exhibits 41 and 42 are photographs, are they not?

A. Yes, they are.

Q. And are they true and accurate representations of the fingerprints that you, of that which you just testified?

A. Yes, sir, they are.

Q. The State would move the admissibility of both 41 and 42. I'll show those now to the defendant.

Mr. Briscoe: No objection, your Honor.

The Court: State's Exhibits No. 41 and No. 42 may be considered as introduced and read into the evidence and may be exhibited to the Jury.

Q. Sgt. LaHue, turning to your analysis and comparison of those prints, what, if anything, did that comparison and that analysis reveal?

A. On this, on the latent print, I found that there was a section that had three bifurcations; and also in comparison, in comparing this section with this section of the right thumb of Carlisle Briscoe, I found that this [1122] same area is identical. That would be this area such as this would be identical to the right thumb print of Carlisle Briscoe.

Q. Sgt. LaHue, I'm going to ask you to step over here, if you can, in front of the Jury and if you need this easel, feel free to use it, and show precisely what

you're talking about in terms of your comparison of both of these prints.

Q. I hope you people can see this. If you will notice this, No. 1 is straight over and here are two ridges coming down and joining into one. This is what I was referring to earlier as a bifurcation. And if you notice, No. 2 goes over and we have the same thing only in reverse and it's two ridges away. We have the ridge coming down and branches out into two. That's also a bifurcation. And No. 3, you'll notice the line, the ridge comes up and branches out into two, and that would be this section. That's basically all there is in this particular section. And if you notice here on the latent fingerprint starting with No. 1, it comes up and branches upward into two. Then if we go to No. 2, we would count one, two ridges over and here we have the other one that's in reverse. It's coming down and branching down into two, No. 1 being here, one, two coming down, branching down into two. Then using No. 1 [1123] as our base then, you'd count such as this: one, and then here we have the ridge coming up, branching upward into two; one, here's our ridge coming up and branching upward.

Q. Now, Sgt. LaHue, with regard to State's Exhibit 42 which is the photograph of the print lifted from the doorway or the piece of glass at the trailer court, that is not a complete fingerprint as you think of a fingerprint.

A. No, sir, it is not.

Q. Is this a finger or thumb print of Mr. Briscoe's known ——— (illegible) ——

A. This is the right thumb print of Mr. Briscoe.

Q. And your testimony is that this is a section of that that you've lifted off of that piece of glass; correct?

A. Yes. What I'm testifying is that these characteristics in this section here that are visible in the latent print are identical to this section here of Carlisle Briscoe's right thumb print.

Q. I'm going to ask you to take this red marking pen and if you'll disfigure your photograph for me, roughly circle the area that's represented on the known print by what you've been able to lift off of the other print.

A. I see.

Q. Your doctor is going to shoot me. It's roughly this area right in here?

A. Yes, sir. That's true.

[1124] Q. Thank you. If you'll have a seat please. Sgt. LaHue, in order to be fair on the record, did you submit this fingerprint to be examined by another agency or any other agencies?

A. Yes, sir. Yes.

Q. And to which agency or agencies did you submit it?

A. I submitted it to the FBI and also the Indiana State Police.

Q. What is their policy as far as identifying fingerprints for other agencies other than their own, as you understand it?

A. All right, sir. I really don't know what the FBI requirements are or their policy is, but I do know that the State Police on a latent print will require eleven point characteristics on a latent print before they would process it.

Q. Did they process your print at all?

A. No, sir; they did not.

Q. Did they even examine it?

A. They visually looked at the latent and stated that they didn't feel there was enough points; of course, they require eleven.

Q. This was the Indiana State Police?

A. Yes, sir.

Q. Now, did the FBI want to get involved in this print [1125] as far as . . .

A. No, in their return they indicated that there wasn't enough points in the latent also.

Q. Now did either of these agencies tell you that that section was not, this section right here, did not come from a known print of Carlisle Briscoe?

A. No, sir, they did not.

Q. They never got to that stage?

A. No, sir, that's true.

Q. What is the sum and essence of your testimony today, Sgt. LaHue?

A. Well, the sum and essence of it would be that the probability, even though it does have only three points, the probability of that being anyone else in Bloomington there probably wouldn't be over fifty to one hundred people who may have that same characteristics.

Q. In that same section?

A. That same section, yes, sir.

Q. Thank you very much, Sgt. LaHue. No further questions.

The Court: You may cross.

CROSS EXAMINATION: CARLISLE BRISCOE

Q. Mr. LaHue, I have a document here filed in Superior Court on February 8th where it states quote "Said fingerprint was not analyzed by the FBI or by the Indiana State Police, and no reports other than those [1126] submitted in earlier responses are in the possession of the State." Another document filed in Superior Court on March 14th, paragraph five, "As indicated in earlier State Response's to Defendant's Notice for Discovery, the results or report of examinations or comparisons made by the FBI of certain latent fingerprint seized at the residence of Frederick McFarland are available through Sgt. Martin LaHue." You changed your time a little bit, didn't you?

A. I don't understand your question, sir.

Q. Are you stating here that there was no evidence, that you never on February 8th, that you never submitted any reports to the FBI or the Indiana State Police. This was on February 8th. But now on March 14th, since defendant is going to go to trial, you

kind of tightened up a little bit. You kind of changed your tune rating the fingerprint. Now may the Court please note that the Federal Bureau of Investigation at Washington, D.C. is the finest criminal laboratory in the world and if you pick up any information, crime magazine, news media or anything, they substantiate that fact. On November 2nd of 1976, mind you, five months before February 8th, Mr. LaHue did get a thing back from Federal Bureau of Investigation, plus another little ditty that the prosecutor forgot to insert. This is Exhibit A, and I will introduce Exhibit B. It says: "Federal Bureau [1127] of Investigation, Washington, D.C. Report of the Identification Division, Latent Fingerprint Section. To Chief of Police, Box 100, Bloomington, Indiana. Attention: Detective Sergeant Martin LaHue, Forsenic (sic) Division. Reference to Carlisle W. Briscoe, Jr. Residence of Frederick Michael McFarland, victim," gives the address.

Mr. Brown: Your Honor, the State has no objection to this evidence being introduced; in fact, we have already done that. But I would only request that we approach it through the proper channels, to have it marked and labelled and circulated to the Jury.

Mr. Briscoe: Your Honor, at this time I'd like to read this and then let the jurors read it. Could I be . . .

The Court: Well, of course, the proper way is to have it marked and identified, and then the jurors can read it.

Mr. Brown: The State would have no objection to that being circulated.

Mr. Briscoe: There was no latent prints of value, of value. Now, this is very imperative that you understand this. These people, the FBI, have got the finest criminal laboratory in the world, and I thank my Makers that the law has, has got an institution such as this. How could the Court take the testimony of a "hill-billy," went to a couple weeks of school. How could they compare them with the FBI laboratory. At this time the [1128] Court would like to enter these as exhibits. At this time I'm going to enter this to the Jury.

The Court: What is that?

Mr. Briscoe: This is Exhibit C, your Honor, pertaining to the fingerprint.

The Court: Exhibit C.

Mr. Brown: I have no objection, Mr. Briscoe. For the record the State has no objection to that exhibit.

The Court: Defendant's Exhibit C may be considered as introduced and read into the evidence and may be exhibited to the Jury.

Mr. Briscoe: First, your Honor, I want to explain some particulars to the Jury before I relate to that. Your Honor, this is my right to explain particulars. This was something that the prosecution did not enter. They tried to cover it up.

Mr. Brown: We have no objection.

* * * * *

[1130]

FEDERAL BUREAU OF INVESTIGATION
Washington, D.C. 20537

REPORT
of the
IDENTIFICATION DIVISION
Latent Fingerprint Section

YOUR FILE NO.

FBI FILE NO.

LATENT CASE NO.

Case #76-16505-S

B-38173

November 2, 1976
REGISTERED

TO: Chief of Police
Box 100
Bloomington, Indiana 47401

Attention: Detective Sergeant Martin LaHue
Forensic Division

RE: CARLISLE W. BRISCOE, JR.
RESIDENCE OF FRED MC FARLAND—
VICTIM
ARLINGTON VALLEY MOBILE HOME, LOT 4
BLOOMINGTON, INDIANA
SEPTEMBER 27, 1976
BURGLARY

REFERENCE: Letter October 6, 1976

EXAMINATION REQUESTED BY: Addressee

SPECIMENS: Lift
Fingerprints of Carlisle W. Briscoe, Jr.

No latent prints of *value* are present on the lift.

You will receive a separate report concerning the result of the laboratory examination.

The specimens are enclosed.

Enclosures (2)

/s/ Richard W. Ash
Assistant Director,
Identification Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action File Cause No. S78-0139

(Caption Omitted In Printing)

MOTIONS IN LIEU OF AN ANSWER

(Filed August 23, 1978)

I

MOTION TO DISMISS FOR IMPROPER VENUE

Comes now Sergeant Martin LaHue, by counsel, who respectfully moves the Court pursuant to F.R.C.P. 12(b)(3) to dismiss the plaintiff's complaint for improper venue.

II

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR IMPROPER VENUE

Comes now the defendant, Sergeant Martin LaHue, by counsel, who would show the Court that:

(1) Sergeant Martin LaHue is a resident of Monroe County, Indiana,

(2) That prior to being incarcerated, the plaintiff, Carlisle W. Briscoe, resided in Monroe County, Indiana; and

(3) All of the acts set forth in the plaintiff's complaint as it relates to Sergeant Martin LaHue occurred in Monroe County, Indiana; and

(4) That pursuant to 28 U.S.C. § 1391(b), places venue in the judicial district where all of the defendants reside, or in which the claim arose; and the proper

venue would lie with the United States District Court for the Southern District of Indiana;

WHEREFORE, the defendant would pray that the Court dismiss the complaint as there is no venue.

III

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Comes now Sergeant Martin LaHue, by counsel, who respectfully moves the Court pursuant to F.R.C.P. 12(b)(6) to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted.

IV

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A.

It is fundamental that in the absence of statute an unsuccessful litigant may not maintain a civil suit for damages against a person for alleged perjury committed by him in a civil action, a criminal prosecution or other proceeding, either as a party or as a witness, *Liddell* v. *Smith*, 345 F.2d 491 (CA7 1965); *Morgan* v. *Graham*, 228 F.2d 625 (CA10 1956). In order for a defendant to be liable under 42 U.S.C. § 1983 it is essential that he must have acted under color of state law to cause the denial of a federally protected right *Espinoza* v. *Rogers*, 470 F.2d 1174 (CA10 1972).

Although Sergeant LaHue was a police officer for the City of Bloomington when he testified at Mr. Briscoe's criminal trial, Cause No. S76-S99, Monroe Superior Court No. 1 (1977), Sergeant LaHue did not purport to act pursuant to any state law but in response to the orders of the Monroe Superior Court which directed him to appear to testify. A witness in a trial is not acting

under color of law and his false testimony does not give rise to a cause of action under Section 1983, *Grow* v. *Fisher*, 523 F.2d 875, 879 (C.A.7. 1975); *Stambler* v. *Dillon*, 302 F.Supp. 1250 (S.D.N.Y. 1969); *Pritt* v. *Johnson*, 264 F.Supp. 167 (N.D.Pa. 1967); *Smith* v. *Jennings*, 148 F.Supp. 641 (D.C. Mich. 1957) The fact that the witness may have been a State official is not significant as his evidence was presented not under color of his office but as any other witness of facts coming to his attention during the time he held such official position, *Spires* v. *Bottorff*, 223 F.Supp. 441 (S.D.Ind. 1963), affmd., 7 Cir., 332 F.2d 179, cert. denied, 379 U.S. 938, 85 S.Ct. 343,13 L.Ed.2d 349, reh. denied, 379 U.S. 985, 85 S.Ct. 675, 13 L.Ed.2d 579. Since *Grow*, *supra* and *Spires*, *supra*, are controlling in the Seventh Circuit, the plaintiff's complaint must be dismissed for failure to state a cause of action under 42 U.S.C.; 1983.

B.

The Complaint in the instant case fails to state a cause of action for allegedly false testimony by defendant LaHue because it simply asserts broadly a constitutional right not to have false testimony used against the plaintiff. Mr. Briscoe conclusorily alleges only that the defendant gave perjured testimony. Due process forbids the knowing use of perjured testimony by the prosecution to obtain a criminal conviction, *Mooney* v. *Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). However, a person's constitutional rights are not violated simply because a witness may have testified falsely in his trial, *McBride* v. *United States*, 446 F.2d 229 (CA10, 1971). Allegations of perjury alone on the part of police officers are not sufficient to state a claim under the Civil Rights Act, *Hurlburt* v. *Graham*, 323 F.2d 723 (CA6 1963). In *Johnson* v. *Stone*, 268 F.2d 803 (CA7 1959) the plaintiff brought an action for damages under §§ 1983 and 1985 of Title 42, United States Code. He alleged that the defendants who were

plaintiffs in a State action, their attorneys and witnesses, conspired through introduction of perjured and slanderous testimony to deprive him of equal protection in a State lawsuit. The federal court dismissed this action for failure to state a claim. In a similar case a U.S. District Court in Oklahoma found that a complaint, filed by a convicted felon, failed to state a cause of action under 42 U.S.C. § 1983 against law enforcement officers for allegedly giving false testimony at the plaintiff's criminal trial because the complaint only alleged that the defendants gave perjured testimony, *Smith* v. *Sinclair*, 424 F.Supp. 1108, 1113 (W.D. Okl. 1976). The defendant feels that the above cited case law is well reasoned, persuasive authority upon which the Court should dismiss the Complaint for failure to state a claim upon which relief can be granted.

In conclusion the defendant feels that the plaintiff's Complaint is essentially an attempt to re-cross examine a witness who testified at the plaintiff's criminal trial for conspiracy to commit first degree burglary, assault and first degree burglary, *Indiana* v. *Briscoe*, Cause #S76-S99, Monroe Superior Court No. 1 (1977). Mr. Briscoe was given an opportunity to cross examine witness LaHue at the above criminal proceeding. Moreover, the Civil Rights Statute was not designed to sponsor career litigants or permit duplicative efforts to prevail. This conclusion is required in the interest of judicial economy and the equity of protecting opposing parties, usually government officials, from vexatious duplicating litigation, *Thistlethwait* v. *City of New York*, 362 F. Supp. 88 (S.D.N.Y. 1973).

V

MOTION IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT

Comes now the defendant Sergeant LaHue, by counsel, who respectfully moves the Court that in the event that his motions for improper venue and failure to state a

claim upon which relief can be granted should be denied, that the Court should grant a motion for a more definite statement pursuant to F.R.C.P. 12(e).

MEMORANDUM IN SUPPORT FOR A MORE DEFINITE STATEMENT

The Complaint is devoid of any factual allegations to support the conclusory charge of knowing and willful false testimony by Sergeant LaHue. If the Court does not deem it necessary to dismiss the Complaint for lack of specific pleading then the Court should require the plaintiff to make a more definite statement so that the defendant may make a responsive answer.

Respectfully submitted,

/s/ William J. Finch
WILLIAM J. FINCH
City Attorney
P.O. Box 100
Bloomington, Indiana 47401
(812) 339-2261, Ext. 236

(Certificate of Service omitted in prining.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S78-0139

(Caption Omitted In Printing)

MOTION IN TRAVERSE IN LIEU OF ANSWER

(Filed September 7, 1978)

Comes now the plaintiff, Carlisle W. Briscoe, pro se in response to defendants motions in lieu of an answer.

Pursuant to the Federal Rules of Civil Procedure, and 28, U.S.C.A. § 1343(3).

(1) Plaintiff states that his legal residence at this time is at the Indiana State Prison, Michigan city Indiana, having been incarcerated at said Prison since the 22nd of May, 1977. Whereby the plaintiff of this action is a residence of Laporte County Indiana, and that said County is within and encompassees the judicial territory of the Northern District, South Bend, Division; and that defendant LaHue's domicile is in Monroe County Indiana.

The defendant in this action having his residence in Monroe County is of no consequence and is totally irrelevant to this action.

That pursuant to Title 28, U.S.C.A. § 1392(A), this court does have the proper venue, as the statute states":

"Any Civil action, not of a local nature, against defendant's residing in different districts in the same State may be brought in any such districts".

WHEREFORE, this court is of the proper venue:

IN RE OF DEFENDANT'S MOTION TO DISMISS

(1) Defendant states that in the absence of statute an unsuccessful litigant may not maintain a civil suit for

damages against a person for alleged perjury committed by him in a civil action, a criminal prosecution or other proceeding, either as a party or witness.

The plaintiff clearly stated that the defendant did commit perjury a violation of 18, U.S.C.A. § 1621, and that the plaintiff was entitled to relief under 42, U.S.C.A.—§ 1983. The plaintiff appeals to his memorandum in support of complaint.

The plaintiff states that the defendant LaHue did act under the color and dress of state law in committing perjury at plaintiff's trial in Monroe Superior Court No. 1.

That this is a question of the fourteenth Amendment rights of the plaintiff, to seek redress pursuant to 42, U.S.C.A. § 1983. In a similar case *Haff* v. *Grams*, 355 F.2d. 542; The court stated the following * * * In Plaintiff's action against police chief for alleged deprivation of civil rights arising from chief's alleged causing of unsound and unwarranted criminal complaints to be issued against plaintiff's question of whether chief of police carried on all activity involved in capacity of private person or whether he acted under color of law was question of fact which could not be disposed of on motion to dismiss for failure to state a claim. 42, U.S.C.S. § 1983—Id.

State prisoner is entitled to relief in Federal Courts only when rights guaranteed him by the United States constitution have been denied him.—*Sinclair* v. *Turner*, 447 Fd. 1158, certiorari denied 92 S.Ct. 13239 405 U.S. 1048 31 led. 2d. 590.

(2) The defendant goes on to state that he was a police officer for the city of Bloomington when he testified at the plaintiff's trial, and that defendant did not purport to act pursuant to any state law but in response to the orders of the Monroe Superior Court which directed him to testify. Defendant goes on to state that a witness in a trial is not acting under color of state law *and his false testimony does not give rise to a cause of action under* 42, U.S.C.A. § 1983.

It is interesting for this court to note, that this defendant not only failed to deny the plaintiff's allegation's but in a very vague way admitted that he had committed perjury. The plaintiff construes this statement, that he is not entitled to any constitutional rights, even before trial. It is the plaintiff's contention that the defendant was assuming that he is "guilty" of subornation of "perjury"?

Is it the duty of the "Monroe Superior Court" to violate the plaintiff's "Fourteenth Amendment Rights" to due-process by allowing the defendant to falsely testify to a falsehood?

(3) Defendant goes on to state, that a persons constitutional rights are not violated simply because a witness may have testified falsely in his trial. Defendant states several cases in reference to this, such as *Mcbribe* v. *U.S.*, *Hurlburst* v. *Graham*, and *Johnson* v. *Stone*. Upon examination of the above stated references, the plaintiff finds that these are false and misleading. Plaintiff states that in these cases, that the court did dismiss action against the defendant's because of a lack of failure to state a claim upon which relief could be granted.

Plaintiff does state a claim upon which relief is sought, and plaintiff has submitted to this court his supporting facts to back up his allegations, which are not really allegations, but facts upon which a claim is based.

The plaintiff states that the defendant did misuse his police authority in testifying to the falsehood of a purported three (3) point fingerprint, knowing that this print was wholly frivolous, and that this print had been refuted by the F.B.I. as of *no-value*. Testifying in court to this matter for the prosecution when this was the only evidence, and it was material and to the issue, was violating the plaintiff's constitutional rights to a fair and impartial trial, that is afforded him under the Fourteenth Amendment to the United States constitution.

In a similar case the court said the following;— Through the civil rights statutes, congress intended to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority, of the state and represent it in some capacity whether they act in accordance with their authority or misuse it—42, U.S.C.A. § 1983 *Scheuer* v. *Rhodes*, (1974) U.S., 40 L.ed.2d. 90, 94. S. CT. 1683.

IN CONCLUSION

The plaintiff does state a claim upon which relief is sought, and further states that this court does have jurisdiction in this cause, to grant the plaintiff relief sought in complaint. Lastly the plaintiff states that this court under the Federal Rules of Civil Procedure must construe the facts set forth in the complaint as being true.

(A) For the purpose of this rule providing for dismissal for failure to a claim upon which relief can be granted, trial judge is to employ *less* stringent standards in assessing pro se pleadings that would be used to judge final product of lawyers. *Hepperle* v. *Johnson* C.A. TEX. 1976 544 F2d. 201.

(B) Allegations of a pro se complaint must be measured by a *less* stringent standard on a motion to dismiss than a formal pleading drafted by an attorney. *McDonnell* v. *U.S.* Atty, Gen. D.C. ILL. 1976, 420 F SUPP. 217.

(C) In considering motion to dismiss, court is to construe complaint and allegations of the complaint as being true. *Hartford Acc. & Indem. Co.* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, D.C. OKL. 1976, 74 F.R.D. 357.

(D) In considering a motion to dismiss, court must take allegations in complaint as true.

For purpose of deciding motion to dismiss, court is to construe complaint favorably to the plaintiff. *Hatridge* v. *Seaboard SUR.*, D.C.OKL. 1976 74 F.R.D. 6.

(E) C.A. PA. 1973. On motion to dismiss, material allegations of complaint are taken as admitted and complaint is to be liberally construed in favor of plaintiff. Fed. Rules. CIV. Proc. Rule 8(f), 28, U.S.C.A.?—*Ammulung* v. *City of Chester*, 355 F. SUPP. 1300.

(F) C.A. MD. 1972 On Motion to dismiss, facts are to be taken in light most favorable to plaintiff.—*Wolman* v. *Tose* 467 F2d. 29.

(G) D.C. MO. 1973. For court to dismiss action on its own motion for failure to state a claim is a radical step not to be taken lighty. Fed. Rules Civ. Proc. 12(b) (6) 28, U.S.C.A.—Barnes v. Dorsey 354 F. Supp. 179.

WHEREFORE; The plaintiff prays that this court hand down judgment in favor of the plaintiff. It is a well established fact, that the defendant Sgt. Martin Lahue did make false declaration and statements before, and during the trial of the plaintiff.

It is fact and the plaintiff so states that the defendant Lahue is in violation of Title 18, U.S.C.A. § 1621 and Title 18, U.S.C.A. § 1623, and while violating these Federal statutes, did deny the plaintiff a fair and impartial trial that is afforded him under the Fourteenth Amendment to the United States Constitution.

Further that this court grant the relief sought in complaint.

(A) To grant a permanent injunction prohibiting the defendant from violating the Fourteenth Amendment rights of the plaintiff:

(B) To hold an open court hearing, to bring criminal charges against said defendant:

(C) To grant the plaintiff $100,000.00 in damages:

Lastly to grant the plaintiff attorney fee's, to be paid by the defendant, and all other relief just and proper.

"That this be done in the interest of justice".

Respectfully Submitted:

/s/ Carlisle W. Briscoe
Plaintiff Pro Se
CARLISLE W. BRISCOE
11270
P.O. Box-41 (ach)-(a29)
Indiana State Prison
Michigan City, Indiana
46360

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action File Cause No. S78-0139

CARLISLE W. BRISCOE, PLAINTIFF

v.

SGT. MARTIN LAHUE, DEFENDANT

ORDER

(Filed September 13, 1978)

Having been duly advised in the premises the Court now orders the Plaintiff to amend his pleading with a more definite statement of the defendant's alleged perjury.

IT IS SO ORDERED.

Dated this 13th day of Sept., 1978.

/s/ [Illegible]
United States District Judge

cc: C.Briscoe
W.Finch
R.Doyle
IndAtty.Genl
Ord. Bk.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
SOUTH BEND, DIVISION

Cause No. S78-0139

(Caption Omitted In Printing)

IN RE OF MOTION FOR
MORE DEFINITE STATEMENT

(Filed September 22, 1978)

Comes now the plaintiff, Carlisle W. Briscoe, by order of this court handed down on the 13th day of September 1978, for a more definite statement.

(1) Plaintiff filed this action on the 6th day of July, 1978, in the United States District Court, South Bend, Indiana, against the defendant Sgt. Martin Lahue of the Bloomington Police Dept., Bloomington, Indiana.

(2) Plaintiff stated a cause of action, that he was denied due process of law under the Fourteenth Amendment.

(3) Plaintiff stated the facts to form the basis for his allegations. The facts reads as follows.—

> Sgt. Martin Lahue did knowingly and willfully submit before the jury on or about March 23, 1977, false testimony and evidence concerning a false three (3) point fingerprint knowing that this print was refuted by the F.B.I., crime lab, as of *no-value* concerning the print of the plaintiff:

(4) Plaintiff filed his memorandum in support of complaint on the 16th day of August 1978, along with above said support motion, plaintiff submitted Plaintiff's exhibits "A" "B" and "C". These being transcripts of different court proceedings in the Monroe County Superior Court No. 1 and No. II. Pertaining to certain declarations and statements made by the defendant concerning a latent three (3) point fingerprint.

(5) On September 13, 1978, this court so ordered the plaintiff to make a more definite statement pertaining to the allegations of plaintiff's complaint.

IN RESPONSE TO A
MORE DEFINITE STATEMENT

Plaintiff states that on the 28th day of Oct. 1976, the defendant testified at a probable cause hearing held in the Monroe Superior Court No. 11. The defendant states the following, under oath and duly sworn:—

> It's my opinion that this is the same section that exist on the right thumb of Carlisle Briscoe; George Abbotts of the Indiana State Police say's it's the same:

That on the 4th day of Oct, 1976, the plaintiff was arrested on the following charges, and incarcerated in the Monroe County jail on a $75,000.00 bond.

(A) Conspiracy to commit first degree burglary

(B) Conspiracy to commit assault and battery with intent:

The defendant did submitt the alleged latent to the F.B.I. for analysis. The plaintiff contends that he so done this in asmuch that he only has two (2) weeks fingerprint training, and that the defendant was not qualified to make such a comparison.

On the 2nd day of November 1976, the defendant Lahue received an F.B.I. report stating the following.—

> NO LATENT PRINTS OF VALUE ARE PRESENT ON THE LIFT:

On the 7th day of Feb, 1977, the plaintiff was charged with the following also.

(A) First degree burglary

(B) Assault and battery with intent

The plaintiff states that the only evidence of the alleged burglary of a mobile home, (theft of a bulldog) was a purported three (3) point fingerprint submitted by the defendant Lahue. Besides this latent print being totally untrustworthy under the teachings of the science of fingerprint comparison, was actually total contravention of the basic premises and tenements of the science of fingerprint identification;

During the trial of the plaintiff on or about March 23, 1977, in the Monroe Superior Court No. 1. The defendant Lahue testified before the jury, not to his opinion, but to the probability of the latent print being that of the plaintiff, doing so under oath and duly sworn, before a competent court using his state authority, and on orders of the Monroe Superior Court. The defendant did so testify that it was probable that it could be anyone of 50 to 100 different people with the same characteristics, in Monroe County Indiana. The plaintiff states that this testimony was so calculated to prejudice the minds of the jury, and to distort and to mislead. The defendant's statement is as follows.—

> "Q. What is the sum and essence of you testimony today, Sgt. Lahue?
>
> "A. Well, the sum and essence of it would be that the probability, even though it does have only three points, the probabilty of that being anyone else in Bloomington there probably wouldn't be over fifty to one hundred people who may have that same characteristics.
>
> "Q. In that same section?
>
> "A. That same section, yes sir".

The plaintiff would show this court up to this point, that here is a police officer with two (2) weeks fingerprint training testifying to the print being three (3) points, when in Oct, 1976, this same police officer knowing that he was not qualified to make such comparison

did submit the alleged latent to the F.B.I. for analysis. Upon the F.B.I. return it was stated that the latent print was of no-value. The F.B.I. crime lab states "nothing" about three points in common, In essence the latent print was "nothing" and you cannot get three points from "nothing".

The plaintiff states that upon establishing this fact. The defendant Lahue did present himself as a fingerprint expert to the jury. In doing so made irreconcilable and contradictory statement concerning the alleged latent print. It was material and to the issue, and had it been reliable would have been of probative value, was the only evidence to obtain a conviction of 10-20 years and 2-14 years. In doing so committed perjury, and denied the plaintiff a basic fundamental right that is afforded him under the Fourteenth Amendment to the United States Constitution. "A fair and impartial trial and due process of law".

The plaintiff states that on the 17th day of November 1977, a second probable cause was issued in the Monroe Superior Court No. 11. In this probable cause the defendant makes the following contradictory statements, as follows:

> The Federal Bureau of Investigation returned it and stated that there was insufficient points on the latent for them—you know—to make a comparison on. The State Police was likewise; The State Police like to have something like eleven points, I believe and I imagine that the F.B.I. is basically the same.

Plaintiff states that the F.B.I. returned the latent analysis, and so stated that there was no latent prints of value present on the lift. The F.B.I. stated nothing about insufficient points. Plaintiff further states, that if the defendant Lahue was to a F.B.I. fingerprint school, he would know how many points it takes to properly indentify a alleged latent print.

The plaintiff concludes the foregoing order for more definite statement, by adding the following.

While the defendant Lahue being a Police Officer for the city of Bloomington, Indiana, and testifying at the trial of the plaintiff, he the defendant acted under state authority.

When knowingly and willfully testifying at said trial while being duly sworn and under oath did make a false declaration and statement that was irreconcilable and contradictory as to the probability of the print, being that of the plaintiff. Did commit perjury a violation of 18, U.S.C.A. § 1621 and 18, U.S.C.A. § 1623, which are Federal statutes. When violating these Federal statutes, did deny the plaintiff a basic fundamental right that is afforded him under the Fourteenth Amendment to the United States Constitution. "A fair and impartial trial and due process of law".

IN CONCLUSION

This court does have jurisdiction in this cause. The plaintiff was deprived right to due process of law. Through different similar cases the plaintiff would show the following.

District Court had jurisdiction of case based on allegations that defendant's actions deprived him of his right to due process of law. *Rapheld* v. *Ice*, D.C. Mo. 1977. 431 F. Supp. 343.

Since plaintiff's in civil rights suit brought against police officers and city, asserted a claim directly under the constitution, and since the amount in controversy exceeded $10,000 in each case, there was jurisdiction over the civil rights claim against the city under section 1331 of title 28, and actions against city could not be dismissed for lack of jurisdiction. *Jones* v. *McElroy*, D.C. Pa.1977, 429 F. SUPP. 848.

This chapter relating to deprivation of rights, privileges or immunities secured by the Constitution and laws gives remedy at law or in equity to any persons for

infringement of his civil rights by one who acts under color of State authority. 42, U.S.C.A. § 1983—*Kellerman* v. *Askew*, C.A. Fla. 1976, 541 F2d. 1089.

Pro Se prisoners complaint under this section can be dismissed *only* when it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him t orelief. 42, U.S.C.A. § 1983 *Smart* v. *Villar*, C.A. Kan.1976, 574 F2d. 112.

ILL. APP. 1977. Perjury count against police officer was legally sufficient where, in addition to charging defendant with offense of perjury in statutory language, count recited the allegedly perjurious responses of defendant before grand jury and alleged also that such responses were known to defendant to be false. S.H.A. ch. 38, 111-3, 1114-1 (A) (8). *People* v. *Toner*, 13 ILL. Dec. 553, 371 N.E. 2d. 270.

C.A. FLA. 1978. The essence of the crime of false swearing is the defendant's knowledge at the time of his testimony that it is untrue. 18, U.S.C.A. § 1623—*U.S.* v. *Crippen*, 570 F2d. 535.

C.A. FLA. 1978. Government may meet it's burden of proving materiality of previous sworn statements, for purpose of perjury prosecution, by introducing the transcript of the prior proceedings. 18, U.S.C.A. § 1623—*U.S.* v. *Crippen.*

Conviction obtained by use of evidence known to be false by representatives of the state who allow it to be admitted without correction must be vacated under *Fourteenth Amendment. Billings* v. *State*, Mo. APP., 1977. 546 S.W.2d. 778.

WHEREFORE; The plaintiff prays that this court hand down judgement in favor of the plaintiff, and grant relief sought in complaint;

(A) To grant a permanent injunction prohibiting the defendant from violating the Fourteenth Amendment rights of the plaintiff:

(B) To hold an open court hearing; to bring criminal charges against said defendant:

(C) To grant the plaintiff one hundred thousand dollars ($100,000.00) in damages:

Lastly to grant the plaintiff attorney fee's, to be paid by the defendant, and all other relief just and proper.

"That this be done in the interest of justice".

Respectfully Submitted:

/s/ Carlisle W. Briscoe
Plaintiff Pro Se
Carlisle W. Briscoe #11270
P.O. Box-41 (ach)-(a29)
Indiana State Prision
Michigan City, Indiana
46360

(Certificate Of Service Omitted In Printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action File Cause No. S78-0139

(Caption Omitted In Printing)

MOTION TO DISMISS, AND MOTION FOR SUMMARY JUDGMENT

(Filed September 28, 1978)

Comes now William J. Finch, counsel for Defendant Sgt. Martin LaHue in the above captioned cause, and hereby renews his motion to dismiss under Trial Rule 12b and moves the Court for Summary Judgment herein pursuant to Trial Rule 56.

This Motion is predicated upon the Pleadings and Exhibits filed herein which counsel believes show no genuine issue of material fact exists herein, and that Plaintiff's pleadings and Exhibits fail to state a claim upon which relief can be granted.

/s/ William J. Finch
WILLIAM J. FINCH
City Attorney,
City of Bloomington
Attorney for Defendant,
Sgt. Martin LaHue
P.O. Box 100
Bloomington, Indiana 47401
(812) 339-2261, Extension 236

/s/ Richard Doyle
RICHARD DOYLE
Attorney for Defendant
602 Odd Fellows Bldg.
South Bend, Indiana 46601

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed September 28, 1978)

Plaintiff has filed herein a *pro se* complaint for infringement of his civil rights under color of law pursuant 42 U.S.C.A. § 1983, an das such is a civil action.

A party against whom a claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor Trial Rule 56(b), FEDERAL RULES OF CIVIL PROCEDURE.

Taken in its best possible light, Plaintiff's Complaint, Motions, Exhibits, and other pleadings have as their basis the following statement

> Sgt. Martin LaHue did knowingly and wilfully submit before the jury on or about March 23, 1977, false testimony and evidence concerning a false three (3) point finger print knowing that this print was refuted by the F.B.I. crime lab, as of *no value* concerning the print of the Plaintiff.

Plaintiff predicates this statement on the following:

(1) "That on the 28th day of September 1976 the defendant testified at a probable cause hearing held in Monroe Superior Court, as follows, to-wit:

> "It's my opinion that this is the same section that exists on the right thumb of Carlisle Briscoe; also Technician George Abbotts of the Indiana State Police said its the same." (Plaintiff's Exhibit "A", page 24, lines 3 thru 6)

(2) That during the trial of the Plaintiff on or about March 23, 1977 in the Monroe Superior Court No. 1, the Defendant testified as follows, to-wit:

> "Q. What is the sum and substance of your testimony today, Sgt. LaHue?

A. Well, the sum and essence of it would be that the probability, even though it does have only three points, the probability of that being anyone else in Bloomington, there probably wouldn't be over fifty to one hundred people who may have that same characteristics.

Q. In that same section?

A. That same section, yes sir."

(Plaintiff's Exhibit "C", page 1125, lines 10 thru 18)

(3) That on the 17th day of November, 1977, in a subsequent probable cause hearing in the Monroe Superior Court, the Defendant testified as follows, to-wit:

"The Federal Bureau of Investigation returned it and stated that there was insufficient points on the latent for them—you know—to make a comparison on. The State Police was likewise; The State Police like to have something like eleven points, I believe, and I imagine that the FBI is basically the same."

(Plaintiff's Exhibit "B", page 10, lines 17 thru 25)

(4) A letter from the F.B.I., dated November 2, 1976, (Plaintiff's Exhibit "C", page 1130) with the statement "No latent print of value are present on the lift."

In sum and substance, therefore, Plaintiff herein is asserting that the Defendant Sgt. LaHue, after receipt of the aforementioned letter from the F.B.I. dated November, 1976, committed perjury by testifying at a probable cause hearing on 17 November 1977, as indicated in (3) above, and at a trial on 23 March 1977 as indicated in note (2) above.

At this point it should be noted that Defendant LaHue's testimony at the probable cause hearing on 28 September, 1976, (1) above preceded the F.B.I. letter and would not therefore, be subject to Plaintiff perjury argument since it preceded receipt of said letter.

At this point it should also be noted that the testimony referred to by Plaintiff is in each instance a part of a whole, and therefore contextual. Only by a full reading of Plaintiff's Exhibits "A", "B", and "C", can the full content of Defendant's testimony be totally weighed.

Finally, at this point it should be noted that in Plaintiff's Affidavit in support of his Motion for a Permanent Injunction filed herein, Plaintiff establishes that his criminal case is currently on appeal to the Indiana Court of Appeals.

With the above in mind, Defendant contends that he is entitled to Summary Judgment herein on any of the following bases, to-wit:

(1) The *Defendant did not perjure himself as a matter of fact.* In the first instance, this Defendant with some fingerprint training took a partial print from a piece of glass, compared it with the known print of the Plaintiff, and testified at a probable cause hearing that "*its my opinion* that this is the same section that exists on the right thumb of Carlisle Briscoe." (emphasis added). Such certainly is not perjury.

Thereafter, chronologically, comes receipt of the letter from the F.B.I. with the statement "No latent prints *of value* are present on the lift" (emphasis added). From the testimony contained in Plaintiff's Exhibits "A", "B", and "C" filed herein, it is established that the print lifted contained only three points, and that the F.B.I. requires eleven points for their particular identification procedures to be applicable. It is noteworthy however, that they do not say the print is of "no value" as alleged by Plaintiff; but that there were, for their purposes (the F.B.I.) "no latent prints of value."

Subsequently, at Plaintiff's trial, Defendant testified concerning the three point print that in addition to Plaintiff, there would probably be no more than fifty to one hundred people in Bloomington who had the same characteristics and, in the testimony on both direct and

cross examination in that trial (pages 1117 to 1128 of Plaintiff's Exhibit "C" filed herein), and by the submitting of the F.B.I. letter into evidence (page 1130 of Plaintiff's Exhibit "C"), a full disclosure of the F.B.I.'s position on the "three point" print was submitted to the trier of fact. Certainly, as such, this is not perjury.

Finally, at a subsequent probable cause hearing, the entire text of which is contained on page 10 of Plaintiff's Exhibit "B" filed herein, the Defendant again testified concerning the fingerprint, and again made a full disclosure of the F.B.I.'s position concerning same. Certainly, that is not perjury.

Defendant, therefore contends that he is entitled to Summary Judgment on the basis that the Complaint, Motions, Affidavits, Exhibits, and other pleadings herein established as a matter of fact that the Defendant did not commit the alleged perjury.

(2) *Taken in its best light, Plaintiff has failed to state a cause of action* against the Defendant. While it is true that a *pro se* complaint is held to less stringent standards than formal pleadings and should not be dismissed for failure to state a claim unless it appears beyond doubt that the prisoner can prove no set of facts in support of his claim which would entitle him to relief, *Haines* v. *Kerner*, 404 U.S 519 92 Sup.Ct. 594, 30 L.Ed.2d 652 (1972), it is equally true that broad and conclusionary statements, *unsupported by factual allegations* are not sufficient to support a cause of action under the Civil Rights Act (emphasis added) *Marcedes* v. *Barrett* 453 F.2d 391 (CA3 1971).

It seems obvious in the instant case that Plaintiff has alleged broad and conclusionary statements, unsupported by factual allegations as represented by the Exhibits and pleadings herein, and as a matter of law has failed to state a cause of action against Defendant.

(3) *Even had the Plaintiff established a prima facie case of perjury against Defendant herein, he would not have stated a cause of action.* Allegations of perjury

alone on the part of police officers are not sufficient to state a claim under the Civil Rights Act, *Hudburt* v. *Groham*, 323 F.2d 723 (CA6 1963); and while it is true that due process of law forbids the *knowing* use of perjured testimony to procure a conviction, *Mooney* v. *Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), a person's constitutional rights are not violated simply because a witness may have testified falsely in his trial, *McBride* v. *United States*, 446 F.2d 229 (CA10 1971), *Johnson* v. *Stone*, 268 F.2d 803 (CA 7 1959).

Indeed, in order for a Defendant to be liable under 42 U.S.C. § 1983 it is essential that he must have acted under color of state law to cause the denial of a federally protected right, and the Courts have repeatedly held that a witness is not acting under color of law but rather as any other witness of facts coming to their attention during the time they held such official position, *Espinoza* v. *Rogers*, 470 F.2d 1174 (CA10 1972), *Spires* v. *Bottorff*, 223 F. Supp. 441 (S.D. Ind. 1963), *affirmed* 7 Cir., 332 F.2d 179, *Cert. denied*, 379 U.S. 938, 85 S.Ct. 343, 13 L.Ed2d 349, reh. denied 379 U.S. 985, 85 S.Ct. 675 13 L.Ed.2d 579.

(4) *The Plaintiff herein is collaterally estopped by the principle of res adjudicata from proceeding with this claim at the present time.*

The Civil Rights Statute was not enacted nor designed to sponsor career litigants or permit duplicative efforts to prevail. This conclusion is required in the interest of judicial economy and the equity of protecting opposing parties, usually government officials, from vexations, duplicating litigation. *Thistlewaite* v. *City of New York*, 362 F. Supp. 88 (S.).N.Y. 1973), as a result, the principles of res adjudicata and issue preclusion are applicable to suits under the Civil Rights Act, *Spence* v. *Latting*, 512 F.2d 93 (CA10 1975), *Rachel* v. *Hill*, 435 F.2d 59 (CA5 1970).

Everything that Plaintiff relies on in his stated cause of action has been and was presented to the trier of

fact in his state criminal proceeding. Everything, therefore, was litigated at that time, and, pursuant his motion on file with this Court, his appeal of said matter is now pending. Therefore, so long as his conviction is not vacated, corrected, or amended, the bar of collateral estoppel applies to this action, *Brazzell* v. *Adams*, 493 F.2d 489 (CA5 1974).

For as the Court stated in *Collins* v. *United States*, 206 F.2d 918, 921 (CA8 1953),

> "It must be borne in mind that what the law guarantees to an individual in the resolution of any justiciable question is legally satisfactory process, not personally satisfying result and where such processes have once been called into play and have operated to produce a particular result on the merits of a question . . . a litigant . . . has had all that he is entitled generally to demand from the law as a matter of right. Hence, as previously indicated, a trial court may . . . refuse ordinarily to give a litigant the opportunity to have such a question redetermined in another proceeding, brought for the purpose or in the hope of obtaining a different result—and especially so where the question is controllingly one of resolving of a fact."

Respectfully submitted,

/s/ William J. Finch
WILLIAM J. FINCH

/s/ Richard Doyle
RICHARD DOYLE

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. S78-139

(Caption Omitted In Printing)

NOTICE OF APPEAL

(Filed October 18, 1978)

Notice is hereby given that Carlisle W. Briscoe, the above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order denying his petition for civil action, entered in this cause on July 6, 1978.

/s/ Carlisle W. Briscoe
Plaintiff Pro Se
Carlisle W. Briscoe #11270
P.O. Box-41 (ach)-(a29)
Indiana State Prison
Michigan City, Indiana
#46360

CWB:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

Civil No. H79-140

CHRIS P. VICKERS, SR. and
JAMES N. BALLARD, PLAINTIFFS

v.

SGT. JAMES W. HUNLEY, Individually and in his capacity as an agent or employee of the Cedar Lake Indiana Police Department, DEFENDANT

COMPLAINT

(Filed March 5, 1979)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES ( ) NO (X)

B. If your answer to A is yes, describe the action in the space below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the Action: _____

2. Court (if federal court, name the district; if state court, name the county):

_____

3. Docket number: _____

4. Name of judge who heard case: _____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?

_____

If you are imprisoned in a state penal institution, then answer C: 1, 2 & 3.

C. 1. Did you present this complaint to the state prison grievance procedure?

YES ( ) NO (X)

2. If your answer is yes, what was the result?

3. If your answer is no, please explain.

NA

PARTIES

(Place your full name in the first blank in paragraph 1. In the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The plaintiff is Christopher P. Vickers, Sr.
James Norman Ballard

2. Plaintiff's address is Post Office Box 41
Michigan City, IN 46360

CAUSE OF ACTION

D. I allege that the following of my constitutional rights, privileges or immunities have been violated.

Allegation 1: The right to trial by an impartial jury as afforded by the Sixth Amendment to the United States Constitution;

Allegation 2: Deprived due process of law as afforded by Section One of the Four-

teenth Amendment to the United States Constitution.

Allegation 3:

E. The following facts form the basis for allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words—but do not make legal arguments or citations).

Allegation 1: Facts listed on back of this sheet.

Allegation 2:

Allegation 3:

(If you need more space to explain any allegation or to list additional facts, use the other side of this sheet or attach an additional sheet.)

E. While under oath at a jury trial had by Vickers and Ballard (Plaintiffs herein) in the month of December, 1977, Sgt. James W. Hunley (an officer of the Cedar Lake Indiana Police Department, and a witness for the state at said trial) did willfully and contrary to his oath deliver before the jury false information pertaining to material facts present before that competent tribunal.

Said testimony, being knowingly perjured, was calculated and delivered only to prejudice and inflame the emotions of the jury against Vickers and Ballard, and obstructed the fair administration of justice thereby denying Vickers and Ballard the benefits of their beforementioned Constitutional Rights.

F. REQUEST FOR RELIEF

1. I Do request that I be allowed to commence this action without prepayment of fees and costs, or security therefor, pursuant to 28 U.S.C. § 1915. The affidavit of indigency below has been completed and is submitted in

support of this request for leave to proceed in forma pauperis.

2. I believe that I am entitled to the following relief:

Plaintiff Vickers seeks compensatory damages from the Defendant in the amount of One Hundred and Fifty-Thousand Dollars ($150,000.00), and additionally seeks punitive damages from the Defendant in the amount of Fifty Thousand Dollars ($50,000.00).

Plaintiff Ballard seeks compensatory damages from the Defendant in the amount of One Hundred and Fifty-Thousand Dollars ($150,000.00), and additionally seeks punitive damages from the Defendant in the amount of Fifty Thousand Dollars ($50,000.00).

Furthermore included in Plaintiffs' litany is that this cause be heard before and tried by a jury.

/s/ Christopher P. Vickers, Sr.
CHRISTOPHER P. VICKERS, SR.

/s/ James N. Ballard
JAMES N. BALLARD
(Signature)
P.O. Box 41
Michigan City, IN #46360
(Address)

AFFIDAVIT

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

Before me the undersigned in and for the said State of Indiana and County of LaPorte presently appeared Chris P. Vickers, Sr. and James N. Ballard, plaintiffs in the within action who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

/s/ Christopher P. Vickers, Sr.

/s/ James N. Ballard
(Signature of affiant-plaintiff)
CHRISTOPHER P. VICKERS, SR.
JAMES N. BALLARD

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 26 DAY OF
FEBRUARY, 1979

/s/ Eugene Mohamed
Notary Public or other authorized
to administer oaths by law

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

PLAINTIFFS' FIRST INTERROGATORIES

(Filed March 5, 1979)

(The loss of the original record in this matter, has resulted in the inability to reproduce a copy of the original filing of "PLAINTIFFS' FIRST INTERROGATORIES", as filed. The contents of said Interrogatories is set forth in Defendant's Answers to said Interrogatories, filed on July 17, 1979, set forth *infra*).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil Action File No. H 79-140

CHRIS P. VICKERS, SR., et alius

v.

SGT. JAMES W. HUNLEY

To Keeper of Records
Cedar Lake Police Station
Post Office Box 305
Cedar Lake, IN 46303

CIVIL SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

(Issued Approximately, March 26, 1979)

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Northern District of Indiana at —— in the city of Hammond, IN on the — day of ——— 19 — at —— o'clock —M. to testify on behalf of ———— in the above entitled action and bring with you

1) The original statement of one James N. Ballard, made on the 25th day of August, 1977; the original statement of one Chris P. Vickers, Sr., made also on the 25th day of August, 1977; and

2) the exact times that Vickers and Ballard arrived at the Cedar Lake Police Station on the 25th day of August, 1977; and the exact time each of the

before-mentioned individuals left the Cedar Lake Police Station on this same date.

/s/ Richard R. Timmons
Clerk

By /s/ Audrey Jensen
Deputy Clerk

March 26th, 1979

/s/ Chris P. Vickers, Sr.
P.O. Box 41; Mich. City, Ind.

(Return on Service omitted in printing.)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil Action File No. H 79-140

CHRIS P. VICKERS, SR., et alius

v.

SGT. JAMES W. HUNLEY

To Keeper of Records
Crown Center Emergency Room Physicians, Inc.
Post Office Box "540"
Crown Point, IN 46307

CIVIL SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

(Issued Approximately, March 26, 1979)

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Northern District of Indiana at —— in the city of Hammond, IN on the —— day of ——— 19 — at —— o'clock —M. to testify on behalf of ———— in the above entitled action and bring with you

1) That portion of the hospital admittance and release sheet which would show the exact time of admittance and exact time of release of one Chris P. Vickers, Sr., on the 25th day of August, 1977; and

2) that portion of the hospital's medical record which would verify the fact that on the 25th day of August, 1977, that stitches were administered upon Chris P. Vickers, Sr., for the purpose of closing

a head wound, and the time that treatment was administered.

/s/ Richard R. Timmons
Clerk

By /s/ Audrey Jensen
Deputy Clerk

March 26th, 1979

/s/ Chris P. Vickers, Sr.
P.O. Box 41; Mich. City, Ind.

(Return of Service Omitted In Printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H79-140

(Caption Omitted In Printing)

ANSWER

(Filed May 10, 1979)

Comes now the defendant, by counsel, and in answer to plaintiffs' complaint alleges and says:

FIRST DEFENSE

That the complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. That the defendant is without sufficient information to form a belief as to the truth of the allegations contained in Rhetorical Paragraph A of the complaint and therefore denies the same.
2. That the defendant is without sufficient information to form a belief as to the truth of the allegations contained in Rhetorical Paragraph B of the complaint and therefore denies the same.
3. That the defendant is without sufficient information to form a belief as to the truth of the allegations contained in Rhetorical Paragraph C of the complaint and therefore denies the same.
4. That the defendant is without sufficient information to form a belief as to the truth of the allegations contained in Rhetorical Paragraph "PARTIES" of the complaint and therefore denies the same.
5. That the defendant denies each and every allegation contained in Rhetorical Paragraph D and all subparagraphs thereof of the complaint.

6. That the defendant denies each and every allegation contained in Rhetorical Paragraph E of the complaint.

7. That the defendant denies each and every allegations contained in Rhetorical Paragraph F and all subparagraphs thereof of plaintiffs' complaint.

THIRD DEFENSE

That the defendant, Sgt. James W. Hunley, was at the time of the incidents alleged in the complaint an officer of the Cedar Lake Indiana Police Department and was acting as such during the course of the facts alleged in the complaint and therefore lacks the capacity to be sued individually by the plaintiffs.

FOURTH DEFENSE

That the matters raised in the plaintiffs' complaint are properly the subject matter of either a direct appeal from a state court criminal conviction or a separate criminal action and therefore the plaintiffs are estopped from maintaining this action.

FIFTH DEFENSE

That during the course of the facts alleged in the complaint the defendant was testifying under oath in a State Criminal Court and as such is immune from a civil action as a result of said testimony.

WHEREFORE, the defendant prays that the plaintiffs' take nothing by way of their complaint, for costs herein, and for all other just and proper relief.

W. T. ENSLEN
/s/ W. T. Enslen
WILLIAM T. ENSLEN
Attorney for Defendant
53 Muenich Court
Hammond, Indiana 46320
(219) 931-1700

Comes now the defendant, by counsel, and demands trial by jury on all issues raised in the plaintiffs' complaint.

/s/ W. T. Enslen
WILLIAM T. ENSLEN
Attorney for Defendant
53 Muenich Court
Hammond, Indiana 46320
(219) 931-1700

(Certificate Of Service Omitted in Printing.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No.: H 79-140

(Caption Omitted In Printing)

MOTION FOR LEAVE TO RESPOND

(Filed Approximately May 18, 1979)

Comes now the plaintiffs, *pro se*, and respectfully petitions the Court for thirty (30) days from and after the return date within which to respond to defendant's "Answer", the same entered into this cause of action on the 10th of May, 1979. In support thereof plaintiffs would show this Court the following:

I

That, absent the citation of Fed. Rules Civ. Proc. Rule 12 B(6) 28 U.S.C.A., defendant by counsel moved to dismiss this cause of action for failure to state a claim upon which relief can be granted. Plaintiffs will, in their response to this first defense, and by law, show the Court that their complaint does state a claim upon which relief can be granted;

II

to the entire allegations of the defendant's second defense, plaintiffs will, and by law, show this defense to be frivolous in that the defendant "is without sufficient information" due to his own failure to file for a more definite statement and/or exercise the discovery rules available to him via the federal rules;

III

to the defendant's third defense plaintiffs will, and by law, show that a police officer is "stripped" from the immunity of his badge when he commits perjury, and subsequently can therefore be sued for his personal acts;

IV

to the defendant's fourth defense plaintiffs will, and by law, show that estoppel does not apply to this action because the violation of the plaintiffs' constitutional rights by the actions of the defendant-police officer give rise to a federal rights violation;

V

to the defendant's fifth and final defense the plaintiffs will, and by law, show that the deprivation of the plaintiffs' civil rights by the actions of the defendant-police officer while he was acting under the color of state law does invoke federal jurisdiction under the civil rights act, and as such, the defendant is not immune from a federal civil action as a result of his testimony in a state criminal court; and lastly,

VI

plaintiffs would like to bring to the attention of this Court the recent case of *Coleman* v. *United States Department of Justice*, 429 F.Supp. 411 (N.D. Ind. 1977), in which the Honorable Judge Sharp stated that he had granted the defendant's motion to dismiss for the reason that his Court record was barren as to any response by the plaintiff towards such motion; therefore the Court had to act on the *Coleman* case with the record presently before it. With this motion, plaintiffs Vickers and Ballard wish to prevent this Court's record from being barren as to any response against the defendant's "Answer", and subsequently have the *Coleman* rationale applied to this, their cause of action;

For the foregoing reasons plaintiffs respectfully request that the Court grant this motion for leave to respond.

Respectfully submitted,

Christopher P. Vickers, Sr.
Plaintiff

James N. Ballard
Co-Plaintiff

(Certificate Of Service Omitted In Printing.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No.: H 79-140

(Caption Omitted In Printing)

REPLY TO ANSWER

(Filed Approximately, May 23, 1979)

Comes now the plaintiffs, *pro se*, in response to the defendant's ANSWER and the five defenses contained therein which was filed as to this cause on May 10th, 1979, and would show this Court the following:

I

As to the defendant's first defense which alleges that the plaintiffs' complaint fails to state a claim upon which relief can be granted, plaintiffs reiterate the original facts which form the basis for their allegations, and add to the same as appears in the following words, to-wit:

While under oath at a jury trial had by Vickers and Ballard (Plaintiffs herein) in the month of December, 1977, Sgt. James W. Hunley (Defendant herein and a officer of the Cedar Lake Indiana Police Department, as well as a witness for the state at said trial) did willfully and contrary to his oath deliver before the jury false information pertaining to material facts present before that competent tribunal. Said testimony, being knowingly perjured, was calculated and delivered only to prejudice and inflame the emotions of the jury against Vickers and Ballard, and obstructed the fair administration of justice thereby denying Vickers and Ballard the benefits of the right to trial by an impartial jury as afforded by the Sixth Amendment to the United States

Constitution; and deprived Vickers and Ballard of due process of law as afforded by Section One of the Fourteenth Amendment to the United States Constitution.

As to the above-pleaded allegations to their complaint, Vickers and Ballard assert that the defendant-police officers, Sgt. James W. Hunley, deprived them of their before-mentioned constitutional rights and did so under the color of state law, and as such, the plaintiffs have stated a claim upon which relief can be granted.

Plaintiffs herein further state that they are in possession of such documents and facts which will, during the course of a trial by jury, enable them to prove beyond doubt the validity of their allegations against the defendant.

II

To the defendant's second defense, in part, plaintiffs restate that the defendant is without sufficient information to form a belief as to Rhetorical Paragraphs A, B, C, and PARTIES, due to the defendants own negligence to file for a more definite statement and/or to exercise rules available to him by way of the Federal Rules, and is therefore legally obstructed from filing for dismissal for the reasons he stated; and

to the defendant's second defense, in part, plaintiffs reiterate the allegations contained in Rhetorical Paragraphs D, E, and F, of their original complaint, and all sub-paragraphs thereof, and demand a trial by jury on all issues previously raised in their complaint.

III

As to his third defense, defendant-police officer Hunley contends that inasmuch as he was an officer of a police department during the course of the facts alleged, i.e., perjury, that he is therefore individually immune to suit.

To this very issue, in *Scheuer* v. *Rhodes*, 94 S.Ct. 1683, 1687 (1974), Chief Justice Warren Burger of the United States Supreme Court, citing *Ex parte Young*, 209 U.S.

123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), stated that ". . . (e)x parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

> '(C)omes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The state has no power to import to him any immunity from responsibility to the supreme authority of the United States.' Id., 28 S.Ct., at 454. (Emphasis supplied.)

"(P)olice officers, of course, are not immune from liability under the Civil Rights Act." *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); as cited from *Kaufman* v. *Moss*, 420 F.2d 1270, 1273 n.4 (3rd Cir. 1970).

By these laws, and to the defendant's third defense, plaintiffs state that defendant-police officer Hunley cannot commit perjury as an officer, and then seek refuge of individual immunity under the aegis of the badge he wears. This defense then, is without merit to this cause of action.

IV

To his fourth defense, in so many words, defendant by counsel has raised the issue of jurisdiction, claiming that the jurisdiction over the subject matter at hand lies in the state court as opposed to this federal court. Initially, and in regards to a Section 1983 action, it is stated in *Torres Irizarry* v. *Toro Goyco*, 425 F.Supp, 366, 369 (D.C. Puerto Rico 1976), that section 1983 was not intended to be used as a substitute for the right of appeal or to collaterally attack a final judgment by the highest court of a state or to relitigate issues which it decided. Were the plaintiffs attacking their state convictions via this 1983 action, they would apply the rationale of the preced-

ing statement to the defendant's fourth defense and concede to the same. Plaintiffs, however, have not instituted their 1983 action for the purpose of attacking the judgment of their state convictions, nor are they relitigating issues decided; rather, they have brought action against a police officer, in that the formulated perjury he delivered during the course of their state trial violated their constitutional rights.

The fact is, that under the color of state law, the defendant has deprived the plaintiffs of certain constitutional rights. The situation being thus, this court has jurisdiction. Or, better stated than by plaintiffs appears the following from *Ruggins* v. *White*, 321 F.Supp. 732, (S.D.N.Y. 1970).: ". . . (F)ederal jurisdiction does *not extend to all controversies between individual*, *Pritt* v. *Johnson*, 264 F.Supp. 167 (M.D.Pa. 1967) . . . but *only to deprivations of constitutional rights arising from the actions of persons acting under color of state law*, *Monroe* v. *Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed. 492 (1961); *United States* v. *Classic*, 313 U.S. 299, 326, 61. S.Ct. 1031, 85 L.Ed. 1368 (1941)." (Emphasis added).

Further concerning the issue of estoppel in the federal courts from actions relating to violation of constitutional rights occurred in state courts, it was stated in *Ney* v. *California*, 439 F.2d 1285 (9th Cir. 1971), that, ". . . (I)f a successful state prosecution based upon the use of information obtained by violating the defendants' constitutional rights could bar a civil rights action against the police for violating his rights, either by analogy to the law of malicious prosecution or on theories of res judicata or estoppel by judgment, the civil rights act could, in many cases, be a dead letter." 439 F.2d 1288.

Plaintiffs therefore contend that they are not estopped from maintaining their action in this federal court; to the contrary, plaintiffs state that Title 28, United States Code, Section 1343(3) confers jurisdiction upon this Court over their civil action brought pursuant to Section 1983, Title 42, United States Code.

V

As to the defendant's fifth and final defense, in his third defense, he claims individual immunity because he was a police officer and was acting as such during the facts alleged in the complaint. Yet in this his fifth defense he claims the immunity from civil action which is afforded to private individuals while testifying under oath in a state criminal court.

Plaintiffs state that the perjury delivered under oath by Sgt. Hunley was, at one point in the trial, referred-to by the prosecutor as a basis for a damaging statement he made against the defendants (Vickers and Ballard). In all probability, plaintiffs Vickers and Ballard verily believe that the prior-mentioned perjury was had as a result of a scheme between the prosecutor and the defendant herein. There are only two established facts beyond question on God's green earth known to the plaintiffs. One is that God did, in fact, create the spoken-of green earth; the other is that prosecutors are totally immune from any action by them in relation to a criminal prosecution, and plaintiffs have therefore chosen not to travel the sacred road of prosecutorial immunity.

Even as defendant-police officer Hunley seeks to classify himself as a private person for the benefit of immunity, it is stated in *Grow* v. *Fisher*, 523 F.2d 875, 877 (7th Cir. 1975), that "(a)n action is not within the scope of § 1983 unless that action is under color of state law. Nevertheless, when private persons engage in prohibited conduct with nonimmune state officials, they are acting under color of state law for purpose of § 1983. *United States* v. *Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966)." Furthermore, *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and its progeny make clear that the officer who, acting under color of state law, commits the act directly relating in a constitutional deprivation is liable for damages under § 1983.

During their state criminal trial, the decisions of the jury were mainly based upon the testimony of states witness'. At the insistence of their court-appointed attorneys neither Vickers nor Ballard took the stand on their own behalf. Of the various witness' Vickers and Ballard wished called on their behalf, none were called. Among no less than twenty-two similar conditions, the then-defendants, Vickers and Ballerd, were tried. Should then, in light of the mentioned circumstances, Sgt. Hunley's influential perjury be viewed so lightly as to allow him immunity?

I'm sure that this court will agree with plaintiffs when they state that man, being the multi-complex and forgetful creature he has become, may certainly be allowed to receive the benefit of a doubt for having delivered a misguided statement while answering questions upon a direct examination at a criminal trial, and can therefore be excused for the same. But while upon his cross-examination, if he holds fast to and reaffirms his original statement, then that statement becomes a verified one made upon his oath. If it can be deemed a truthful statement, so be it. But yet if it can be deemed a false statement, and can be so proved, then the human element of error must be eliminated and that statement must properly be labeled "perjury". The situation of Sgt. Hunley's perjury being such, he should not be allowed to become a private citizen solely for the purpose of committing perjury and thereby circumvent prosecution for his illegal acts, and after the perjury has been fulfilled, once again become a police officer.

For these reasons plaintiffs state that defendant-police officer Hunley is liable to them for his perjury under Section 1983 for deprivation of rights under color of state law.

WHEREFORE, plaintiffs pray that this cause of action not be dismissed in favor of the defendant, and that this

honorable court set a date upon which a trial by jury will be had as to defendant Hunley's perjury.

Christopher P. Vickers, Sr.
Plaintiff pro se
Post Office Box 41
Michigan City, IN 46360

James N. Pallard
Co-Plaintiff pro se
Post Office Box 41
Michigan City, IN 46360

(Certificate of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H79-140

PLAINTIFFS' FIRST INTERROGATORIES

(Filed July 17, 1979)

Directed To: Sgt. James W. Hunley
Cedar Lake Police Department

(Although this document is entitled "PLAINTIFFS' FIRST INTERROGATORIES", the document is Defendant's Answers to "PLAINTIFFS' FIRST INTERROGATORIES" which appears to have been prepared by Defendant by inserting Answers directly on a copy of "PLAINTIFFS' FIRST INTERROGATORIES" and filing said document as Answers with the United States District Court For the Northern District of Indiana, Hammond Division, July 17, 1979).

Plaintiffs' propounded the following interrogatories to the defendant, Sgt. James W. Hunley, pursuant to the Federal Rules of Civil Procedure, Rule 33, 28 U.S.C.A. Defendant is directed to answer the same fully and separately, under oath, within thirty (30) days of receipt thereof.

1. Please state your name and occupation.

ANSWER: James W. Hunley, Sgt., Cedar Lake Police Dept., Cedar Lake, Indiana.

2. Did you take separate statements from plaintiffs Vickers and Ballard at the Cedar Lake Police Station on the 25th day of August 1977?

ANSWER: Separate statements were taken from Vickers and Ballard; the defendant supervised the interrogation of Vickers and Ballard; other police officers were present and may have asked questions of Vickers and Ballard.

3. If the answer to interrogatory number two is yes, which of the two made their statements to you first?

ANSWER: Vickers was interrogated first and refused to sign a waiver of rights; Ballard was then interrogated and after signing a waiver of rights made a statement; Vickers thereafter signed a waiver and made a statement.

4. Well in your custody, were Vickers and Ballard together prior to, or during the time they made their statements?

ANSWER: It is unknown if Vickers and Ballard were together prior to making their statements; insofar as the defendants knowledge is concerned the two (2) were not together during the time they made their statements.

5. Well in your custody did Vickers have to be taken to the hospital?

ANSWER: Vickers was asked if he wanted to go to a hospital; he refused but later asked to go. The defendant has no knowledge of whether Vickers had to be taken to a hospital inasmuch as that is a medical conclusion.

6. If the answer to interrogatory number five is yes, was Vickers' statement made to you prior to his having left for the hospital, or upon his return from the hospital?

ANSWER: Upon his return, a formal statement was taken.

7. Did you at any time advise Vickers that he had better file Assault and Battery charges against a one Glen Wright because Wright's commonlaw wife was filing rape charges against Ballard and he?

ANSWER: Vickers asked what could be done about a fellow with a pipe; he was advised that he could sign an affidavit for assault and battery if he desired.

8. What was the amount elapsed between the time Vickers signed his waiver of rights paper, and the time he made his actual statement to you?

ANSWER: The exact period of time that elapsed between the waiver being signed and the formal statement being taken is unknown.

9. Did Vickers sign his waiver of rights paper prior to his having gone to the hospital, or after he had returned?

Answer: Prior.

10. From memory, if possible, or from records sir, would you please insert the following times:

(a) Time that Ballard signed his waiver of rights.

ANSWER: 1:45 p.m. (from Ballard's waiver of rights form).

(b) Time that Ballard made his statement to you.

ANSWER: 1:50 p.m. (from Ballard's waiver of rights form).

(c) Time that Vickers signed his waiver of rights.

ANSWER: 1:15 p.m. (from Vickers waiver of rights form).

(d) Time that Vickers made his statement to you.

ANSWER: Approximately 5:00 p.m.

(e) Time that Ballard was transferred from the Cedar Lake Police Station to the Lake County Jail.

ANSWER: Approximately 3:35 p.m. (by radio log).

(f) Time that Vickers left the Cedar Lake Police Station to go to the hospital.

ANSWER: Approximately 2:22 p.m. (by radio log).

(g) Time that Vickers returned to the Cedar Lake Police Station from the hospital.

ANSWER: Approximately 5:24 p.m. (by radio log).

(h) Time that Vickers was transferred from the Cedar Lake Police Station to the Lake County Jail.

ANSWER: Approximately 6:56 p.m. (by radio log).

(i) Time that Vickers and Ballard originally arrived at the Cedar Lake Police Station in your custody.

ANSWER: Unknown.

11. Prior to your testifying on behalf of the state against Vickers and Ballard, did you spend your entire time in the courtroom seated at the same table with the prosecutor?
ANSWER: Yes.

12. Did you and the prosecutor at any time discuss the questions that were to be asked of you?
ANSWER: Yes.

13. While under oath and upon the witness stand, did you answer all questions asked of you honestly?
ANSWER: Yes.

14. Were you aware at any time that Glen Wright had assaulted Vickers and Ballard with a steel pipe and can of chemical mace?
ANSWER: Vickers and Ballard advised the defendant that a person had assaulted them with a steel pipe and a can of chemical mace; whether this incident actually happened is unknown to the defendant.

15. Well Vickers was in your custody, did you have occasion to notice that the entire top half of the back of his shirt was saturated with blood?
ANSWER: The defendant noticed that Vickers had blood on his shirt; the amount and extent of that blood is unknown at this time.

16. Were you aware that Vickers had a head wound?
ANSWER: Vickers had blood on his head; the defendant did not inspect for a wound.

17. Was there a tape recording made of Vickers, Ballard, and Fay, while they made their statements to you at the Cedar Lake Police Station?
ANSWER: Yes, a tape recording was made of the statement of Vickers and Ballard; it is unknown if a tape recording was made of the statement of Fay.

18. If the answer to interrogatory number seventeen is yes, are these recordings still in the possession of the Cedar Lake Police Station?

ANSWER: No.

19. While upon the witness stand during direct examination, did you make the following statement:

(a) That Vickers' signature was affixed upon his waiver of rights and upon his statement, in your presence?

ANSWER: Objection; this question calls for speculation as to the testimony of the defendant on direct examination at the trial of Vickers and Ballard; the transcript of the defendant's testimony at said trial is the best evidence of his testimony and speaks for itself.

20. Did Vickers, in fact, sign his statement?

ANSWER: No.

21. During cross examination by Vickers' attorney, Mr. Mullins, did you make the following statements:

(a) That Vickers made his statement to you within a few minutes after he signed his waiver of rights?

ANSWER: Objection; question calls for speculation, the transcript of the defendant's testimony at the trial of Vickers and Ballard is the best evidence of the statements made.

(b) That you were certain you took a complete statement from Vickers before he went to the hospital?

ANSWER: Objection; question calls for speculation, the transcript of the defendant's testimony at the trial of Vickers and Ballard is the best evidence of the statements made.

(c) That after the statements were taken, Ballard went to the County Jail, and Vickers went to the hospital?

ANSWER: Objection; question calls for speculation, the transcript of the defendant's testimony at the trial of Vickers and Ballard is the best evidence of the statements made.

22. Were you made aware that Miss Fay and Mr. Wright lived together?

ANSWER: The defendant was told by Miss Fay that she and Mr. Wright lived together.

23. Were you aware that the alleged disorderly conduct had taken place some hours after Mr. Wright had returned home and found Miss Fay there, after having been gone the entire night before?

ANSWER: Unknown.

24. While in your custody, were Vickers, Ballard, and Fay given lie detector tests so as to substantiate Miss Fay's serious allegations?

ANSWER: No polygraph tests were offered to Vickers, Ballard or Fay.

25. Were you made aware that prior to this complaint, that Vickers had written to your police station to receive information there, and was denied the same?

ANSWER: The defendant is aware that Vickers wrote a letter to the Cedar Lake Police Department requesting certain information and further the defendant is aware that Mr. Vickers was advised to contact the Lake County Prosecutor's Office or the Lake County Court from which he was sentenced for this information.

26. To the best of your knowledge, does the wife of any of the officers which were involved in the arrest of Vickers and Ballard and Wright work at the hospital where Vickers was taken for treatment?

ANSWER: Unknown.

27. If the answer to interrogatory number twenty-six is yes, please state that officer's name.

ANSWER: Not applicable.

28. To your knowledge, are you aware that Vickers wrote to this same hospital as to receive information, and was denied?

ANSWER: Unknown.

29. Was Miss Fay and Vickers sent to the same hospital?

ANSWER: Yes, St. Anthony's Hospital.

30. Are you aware that a nurse worked at the hospital Vickers was treated at advised Miss to contact a certain "Rape Committee"?

ANSWER: Unknown.

31. Did Miss Fay go to the hospital to be checked?

ANSWER. Yes.

32. Did you advise her to?

ANSWER: A defendant has no independent recollection at this time whether he advised Miss Fay to go to the hospital to be checked.

33. Did Miss Fay leave a copy of the examining doctor's report with you after her examination?

ANSWER: No.

34. If the answer to interrogatory number thirty-three is yes, did this examination report state, in fact, that there was no sign of forced entry or trauma?

ANSWER: Not applicable.

35. Did Mr. Ballard or Mr. Vickers at any point ever deny to you that they'd had sexual relations with Miss Fay?

ANSWER: No.

36. Were you extended any form of gratuity whatsoever, in exchange for your testimony?

ANSWER: No.

37. Vickers and Ballard allege that you committed perjury against them, and did so knowingly, and they are willing to subject themselves to a lie detector test, should the occasion arise. Would you be willing to subject yourself to the same, concerning the perjury allegations against you?

ANSWER: Objection; the answer sought by this question can not lead to any discoverable information.

Thank you very much Mr. Hunley, for your time and consideration.

Respectfully submitted,

CHRISTOPHER P. VICKERS, SR.
Plaintiff herein

/s/ James N. Ballard
JAMES NORMAN BALLARD
Co-Plaintiff herein

CHRISTOPHER P. VICKERS, SR.
Post Office Box 41
10096 Ach A28
Michigan City, IN 46360

/s/ James W. Hunley
JAMES W. HUNLEY

STATE OF INDIANA)
) ss:
COUNTY OF LAKE)

Subscribed and sworn to before me this 16th day of July, 1979.

My Commission Expires 1/28/83
County of Residence: Lake

/s/ Mary Lee Warner
MARY LEE WARNER
Notary Public

(Certificate of Service Omitted In Printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H79-140

(Caption Omitted In Printing)

REQUEST FOR ADMISSION

(Filed July 20, 1979)

Comes now plaintiffs, *pro se*, and pursuant to Fed. Rules Civ. Proc. rule 36(a), 28 U.S.C.A., and herewith submits to the defendant the following requests for admission, and requests that he answer the same fully and under oath or by affirmation within thirty (30) days after receipt thereof.

1. That your present position and rank within the Cedar Lake Police Department is not, and has not been since shortly after the convictions of Vickers and Ballard, that of Sergeant.

2. That while testifying under oath against Vickers and Ballard during the course of their jury trial in December of 1977 in the Superior Court of Lake County, Criminal Division, Room Three, you gave the following answers to the following questions asked of you on cross examination by Vickers' attorney, Mr. Mullins:

BY MR. MULLINS

Q. Your time on this Miranda Waiver Form is one-fifteen p.m., is that correct?

A. Yes sir.

Q. Is that the time you took the statement from Mr. Vickers?

A. It was right within a few minutes there.

Q. Isn't it correct after he signed the waiver he was driven to the hospital for treatment and returned later?

A. We advised Mr. Vickers he should go for medical attention. He said he didn't need it. We took a statement and then—

Q. Are you certain you took a complete statement, waiver form and statement before he went to the hospital?

A. Yes sir. Mr. Ballard was en route jail and the officers took Mr. Vickers to the hospital.

SOURCE: TRIAL TRANSCRIPT, PAGE 193

3. That while testifying under oath against Vickers and Ballard during the course of their jury trial in December of 1977 in the Superior Court of Lake County, Criminal Division, Room Three, you gave the following answers to the following questions asked of you on cross examination by Vickers' attorney, Mr. Mullins:

BY MR. MULLINS

Q. Sergeant Hunley, these two statements that you talked about, State's Exhibits 3 and 4?

A. Yes.

Q. Were they taken in the same room together?

A. Not together, sir.

Q. They were taken apart?

A. Yes sir.

Q. Approximately the same time?

A. Within a half hour.

SOURCE: TRIAL TRANSCRIPT, PAGES 201, 202

4. That while testifying under oath against Vickers and Ballard during the course of their jury trial in December of 1977 in the Superior Court of Lake County, Criminal Division, Room Three, you gave the following answers to the following questions asked of you on cross examination by Vickers' attorney, Mr. Mullins:

BY MR. MULLINS

Q. Two or three different versions of what actually happened?

A. I received versions from Kathy Fay and versions from Paul Vickers.

Q. You recorded all of them?

A. Yes.

Q. The same day, or Kathy Fay was later. You had her go to the hospital also?

A. Yes.

SOURCE: TRIAL TRANSCRIPT, PAGE 195

5. That while testifying under oath against Vickers and Ballard during the course of their jury trial in December of 1977 in the Superior Court of Lake County, Criminal Division, Room Three, you gave the following answers to the following questions asked of you on direct examination by deputy prosecuting attorney Kowalski:

BY MR. KOWALSKI

Q. Sergeant Hunley, I will hand you what has been marked State's Exhibit Number 3 which is a four page written document and ask you to look at it and tell the jury if you know what it is?

A. Yes sir.

Q. What does that represent?

A. The statement that I received from Mr. Vickers.

Q. And does it also contain a statement of his waiver of rights?

A. Yes.

Q. Whose signature appears on that document?

A. My signature and Christopher Vickers.

Q. And the signature of Defendant Vickers appears also upon the waiver and on the statement?

A. Yes.

Q. Was that signature affixed in your presence?

A. Yes.

SOURCE: TRIAL TRANSCRIPT, PAGES 187, 188

6. That during the statement you took from Kathy Fay at the Cedar Lake Police Station on August the 25th, 1977, you asked her the following questions and she gave you the following answers:

BY HUNLEY

Q. You have been examined by a doctor at St. Anthony Hospital in Crown Point, and you have given permission for the report to be turned over to the prosecutor?

A. Yes.

Q. There were relations?

A. Yes.

Q. Did you sign a release with the doctor to give me that report?

A. Yes.

Q. Will you leave a copy of that with me?

A. Yes.

SOURCE: FAY'S STATEMENT TO HUNLEY ON AUGUST 25TH 1977

7. That at numerous times during your testimony, upon cross and direct examinations, you knowingly and willfully delivered perjured testimony before the jury during the course of the jury trial had by Vickers and Ballard in the Superior Court of Lake County, Criminal Division, Room Three.

8. That the answer to interrogatory number one (1) was falsely stated by you on your oath, as to that question.

9. That the answer to interrogatory number four (4) was falsely stated by you on your oath, as to that question.

10. That the answer to interrogatory number six (6) was falsely stated by you on your oath, during the spoken-of jury trial.

11. That the answer to interrogatory number eight (8) was falsely stated by you on your oath, as to that question.

12. That the answer to interrogatory number thirteen (13) was falsely stated by you on your oath, as to that question.

13. That the answer to interrogatory number fourteen (14) was falsely stated by you on your oath, as to that question.

14. That the answer to interrogatory number seventeen (17) was falsely stated by you on your oath, as to that question.

15. That you objected to interrogatories 19(a) and 21 (a), (b), and (c) due to the fact that you committed perjury as to those very questions, inter alia, during your testimony at the criminal trial of Vickers and Ballard.

Respectfully submitted,

/s/ Christopher P. Vickers, Sr.
CHRISTOPHER P. VICKERS, SR.
Plaintiff

/s/ James N. Ballard
JAMES N. BALLARD
Co-Plaintiff

(Certificate of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H79-140

(Caption Omitted In Printing)

ANSWER TO PLAINTIFFS' REQUEST FOR ADMISSION

(Filed August 30, 1979)

Comes now the defendant, by counsel, in answer to the request for admission filed by the plaintiffs, alleges and says:

1. That the defendant denies the requests numbered 1, 7, 8, 9, 10, 11, 12, 13, 14 and 15.
2. That the defendant objects to the requests numbered 2, 3, 4, and 5 on the ground that the request calls for speculation and the transcript of the testimony mentioned at the trial of Vickers and Ballard is the best evidence of the statements made.
3. That the defendant objects to the request number 6 on the ground that the request calls for speculation and that the statement of Kathy Fay, if any, is the best evidence of the statements made.

W. T. ENSLEN

/s/ William T. Enslen
WILLIAM T. ENSLEN
Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H79-140

(Caption Omitted In Printing)

AFFIDAVIT

(Filed August 30, 1979)

JAMES W. HUNLEY, being first duly sworn upon his oath, deposes and says:

That he has read the above and foregoing Answer to Plaintiffs' Request for Admission and is familiar with the matters set forth therein and that the facts therein stated are true.

And further your affiant sayeth not.

/s/ James W. Hunley
JAMES W. HUNLEY

SUBSCRIBED AND SWORN to before me this 28th day of August, 1979.

/s/ Cynthia J. Cooper
CYNTHIA J. COOPER
Notary Public

My Commission Expires: 10/22/79
County of Residence: Lake

(Certificate Of Service Omitted In Printing.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No.: 79-140

(Caption Omitted In Printing)

Submitted to:
Honorable James T. Moody
at pre-trial conference
at the Indiana State Prison,
October 16, 1979.

MOTION FOR ORDER TO PRODUCE MATERIALS RELEVANT TO THIS ACTION

(Filed October 16, 1979)

Comes now plaintiffs herein and respectfully move the Court to mandate the Superior Court of Lake County, Criminal Division, Room Three, to produce the closing arguments in relation to criminal cause number 3CR-118-877-609, and for cause states as follows:

1. That the closing arguments from plaintiffs' state criminal trial are material to this action in that there is revealed therein a statement by the deputy prosecutor that meets the ends for which the perjury itself was formulated and delivered;
2. that production of the mentioned closing arguments will simplify the issue of perjury by the defendant during the course of a jury trial to this action; and
3. that plaintiffs have been diligent in their repeated efforts to obtain the closing arguments from the mentioned Court, and submit this motion only as a last resort (see, attached hereto "a", "b", and "c".)

WHEREFORE, plaintiffs pray the request of this motion be granted, and that this Court further allow the

mentioned arguments to be admitted as an exhibit to this conference, nunc pro tunc, for the purpose of admitting the same during the trial to this matter.

Respectfully submitted,

CHRIS P. VICKERS, SR.
Plaintiff
JAMES N. BALLARD
Plaintiff

AFFIRMATION

I affirm, under the penalties for perjury, that the preceding representations are true.

CHRIS P. VICKERS, SR.

JAMES N. BALLARD

LAKE COUNTY SUPERIOR COURT
CRIMINAL DIVISION
CROWN POINT, INDIANA

Cause No.: 3CR-118-877-609

(Caption Omitted in Printing)

MOTION TO TRANSCRIBE AND PRODUCE OPENING STATEMENTS AND CLOSING ARGUMENTS

Comes now defendants herein, *pro se* and in *forma pauperis*, and moves the Court to furnish them with all opening statements and closing arguments in relation to the above-captioned cause number, and in support thereof states:

1. That defendants are filing a *pro se* petition for post conviction relief in relation to the above-captioned cause number and criminal action;
2. that the Indiana Supreme Court has recognized the defendants as indigents, and has sent them a copy of their trial transcript as to the above-captioned cause number, to be used in the preparation of their mentioned *pro se* post conviction relief petition;
3. that, inter alia, to be included in the spoken-of post conviction relief petition are certain issues which stem from various remarks made by the prosecutor and court-appointed attorneys during the opening statements and closing arguments, and the production of the requested statements and arguments will bear the merit of the defendants' allegations of inefficient assistance of counsel, and prejudicial remarks made by the prosecutor during the course of the defendants' criminal trial;
4. that defendants reiterate their indigency as set forth in the proceeding enumerated paragraph two, and cannot therefore defray any costs involved in the transaction and the production of the statements and arguments in mention;

5. that without the requested statements and arguments, defendants will be unjustly denied the opportunity to present for judicial review certain valid allegations which deal with their accusations of denial of a fair and impartial jury trial; and

6. that defendants verily believe the issues of their post conviction relief petition are meritorious, and that certain of these issues cannot be presented properly without the request of this motion being granted.

WHEREFORE, defendants pray and ask the Court to grant this motion; that the Court cause the Clerk to forward to them, free of charge and without undue delay, the requested opening statements and closing arguments; and for all other, or alternate relief deemed proper.

Respectfully submitted,

CHRIS P. VICKERS
Movant herein
JAMES N. BALLARD
Movant herein

AFFIRMATION

I solemnly swear and affirm that the preceding is the truth in this mater now in hearing before this Court; and this I do as I shall answer under the pains and penalties of perjury.

CHRIS P. VICKERS

JAMES N. BALLARD

LAKE COUNTY SUPERIOR COURT
CRIMINAL DIVISION
CROWN POINT, INDIANA

Cause No.: 3CR-118-877-609

(Caption Omitted in Printing)

AFFIDAVIT OF INDIGENCY

I, Chris P. Vickers, state that I have no money or other funds sufficient to defray the costs involved in the transcription and production of the opening statements and closing arguments requested in the preceding attached motion, nor am I financially able to pay for any other services which may be included in relation to the same.

CHRIS P. VICKERS

AFFIRMATION

I affirm, under the penalties for perjury, that I have signed the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

CHRIS P. VICKERS

LAKE COUNTY SUPERIOR COURT
CRIMINAL DIVISION
CROWN POINT, INDIANA

Cause No.: 3CR-118-877-609

(Caption Omitted in Printing)

AFFIDAVIT OF INDIGENCY

I, James N. Ballard, state that I have no money or other funds sufficient to defray the costs involved in the transcription and production of the opening statements and closing arguments requested in the preceding attached motion, nor am I financially able to pay for any other services which may be included in relation to the same.

JAMES N. BALLARD

AFFIRMATION

I affirm, under the penalties for perjury, that I have signed the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

JAMES N. BALLARD

LAKE COUNTY SUPERIOR COURT
CRIMINAL DIVISION
CROWN POINT, INDIANA

Cause No.: 3CR-118-877-609

(Caption Omitted In Printing)

STIPULATION

It is hereby stipulated between the movants, pursuant to Trial Rule 53.1(A)(3) that the time within which the Court may rule on movant Vickers and Ballard's submitted Motion to Transcripe and Produce Opening Statements and Closing Arguments, filed on June 11, 1979, shall be extended to and including August 20th 1979.

Dated: August 6, 1979.

/s/ Chris P. Vickers
CHRIS P. VICKERS
Movant

/s/ James N. Ballard
JAMES N. BALLARD
Movant

Indiana State Prison
Post Office Box 47
Michigan City, IN 46360

LAKE COUNTY SUPERIOR COURT
CRIMINAL DIVISION
CROWN POINT, INDIANA

Cause No.: 3CR-118-877-609

(Caption Omitted In Printing)

PRAECIPE

To the Clerk of the Lake Superior Court of Lake County, Indiana:

You are hereby requested to withdraw the submission of this cause from the Honorable James C. Kimbrough, and to disqualify said judge from proceeding further in this cause on the ground that:

1. On July 11, 1979, a motion to transcripe and produce opening statements and closing arguments was submitted for ruling to the Honorable James C. Kimbrough;

2. that on August 6, 1979, a stipulation was filed with the Court extending the time for ruling upon said motion to and including August 20th 1979; and

3. that it is August 20th 1979 and the Honorable James C. Kimbrough has delayed ruling on said motion; and more than thirty days has passed since the submission of said motion and the Honorable James C. Kimbrough has delayed ruling on said motion.

You are further requested to give written notice to the Honorable James C. Kimbrough and the Supreme Court of Indiana that submission of this cause has been withdrawn and to perform all other duties required of you by Trial Rule 53.1 of the Indiana Rules of Procedure.

Dated: August 20th 1979

/s/ Chris P. Vickers
CHRIS P. VICKERS
Movant herein

/s/ James N. Ballard
JAMES N. BALLARD
Movant herein

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No.: 79-140

(Caption Omitted In Printing)

Submitted to:

Honorable James T. Moody
at pre-trial conference
at the Indiana State Prison,
October 16, 1979.

MOTION TO ADMIT UNOBTAINED DOCUMENTS

(Filed October 16, 1979)

Comes now plaintiffs herein and respectfully move the Court as follows:

1. That for the purpose of being introduced at trial, the following documents be admitted during pre-trial:

a) the records requested as set forth in the attached subpoena to produce documents, directed to: Keeper of Records; Cedar Lake, Indiana, Police Department; and

b) the records requested as set forth in the attached subpoena to produce documents, directed to: Keeper of Records; Crown Center Emergency Room Physicians, Inc.

2. These subpoenas are to be served when a trial date is set as to this action.

WHEREFORE, plaintiffs pray this motion be granted and the requested documents be entered as exhibits to the pre-trial hearing, nunc pro tunc.

Respectfully submitted,

CHRIS P. VICKERS, SR.
Plaintiff

JAMES N. BALLARD
Plaintiff

AFFIRMATION

I affirm, under the penalties for perjury, that the preceding representations are true.

CHRIS P. VICKERS, SR.

JAMES N. BALLARD

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No.: 79-140

(Caption Omitted In Printing)

CONSENT TO TRIAL OF JURY CASE BY UNITED STATES MAGISTRATE

(Filed Approximately October 31, 1979)

The undersigned plaintiffs to the captioned cause, pursuant to *Muhich* v. *Allen*, 603 F.2d 1247 (7th Cir. 1979) and *Hill* v. *Jenkins*, 603 F.2d 1256 (7th Cir. 1979) hereby specifically waive trial before the District Judge and consent to the trial of this civil matter by a full-time United States Magistrate for this District and specifically authorize that magistrate to conduct any and all proceedings and order the entry of judgment of the District Court in this civil matter in accordance with the Federal Rules of Civil Procedure, so long as this trial is had before a jury.

Dated at Michigan City, Indiana, this 30th day of October, 1979.

CHRIS P. VICKERS, SR.
Plaintiff Pro Se

JAMES N. BALLARD
Plaintiff Pro Se

(Certificate of Service Omitted in Printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Cause No. H 79-140

(Caption Omitted In Printing)

MOTION TO DISMISS

(Filed November 23, 1979)

Comes now defendant, James W. Hunley, by counsel, and moves the Court to dismiss plaintiff's complaint due to plaintiff's failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6). A memorandum in support of defendant's Motion to Dismiss is attached hereto and made a part hereof.

WHEREFORE, defendant, James W. Hunley, moves the Court to dismiss plaintiff's complaint, and for all other just and proper relief.

/s/ William T. Enslen
WILLIAM T. ENSLEN
Attorney for Defendant
53 Muenich Court
Hammond, Indiana 46320
Phone: 219/931-1700

(Certificate Of Service Omitted In Printing)

MEMORANDUM

Plaintiffs have filed a pro se complaint against the defendant, individually and in his official capacity as a police officer pursuant to 42 U.S.C. Section 1983. It is plaintiff's contention that the defendant gave perjured testimony at their trial. As a result, they claim that their right to a trial by an impartial jury was violated and that they were deprived of due process of law. Each plaintiff believes himself to be entitled to $150,000.00 compensatory damages and $50,000.00 punitive damages.

The issue before the Court herein is whether an allegation of perjury of a state's witness states a cause of action against the defendant, individually and in his official capacity as a police officer, under 42 U.S.C. Section 1983. In the only case counsel has found which focuses on the issue herein, the United States Court of Appeals, Sixth Circuit, held there to be no cause of action under 42 U.S.C. Section 1983 of the Civil Rights Act.

In *Hurlburt* v. *Graham*, 323 F.2d 723, (6th Cir., 1963), plaintiff filed his complaint under 42 U.S.C. Section 1983, 1985 and 1986. By his complaint, plaintiff sought damages for an alleged conspiracy by a justice of the peace, a prosecuting attorney, two (2) state policemen, three (3) municipal policemen, and two(2) others to deprive him of his civil rights. In addition to other allegations against the defendants, the plaintiff alleged that the police officers gave false testimony at the trial level. The Court of Appeals stated, at page 725, that:

> "[T]he police officers did not become liable under the Civil Rights Act merely because they investigated the accident, served a ticket on the plaintiff which required him to appear before the justice and testified in the case. The officers were not responsible for what subsequently took place in the trial of the case . . . Nor do we think that giving a false version of the accident (which plaintiff claims the officers and other defendants did) would bring the case un-

der the Civil Rights Act. If the rule were otherwise, any disgruntled litigant who lost his case in the state court could get a retrial in the federal court by alleging that his opponent gave a false account of the controversy."

The Court further stated that . . . "[i]f irregular procedures were used in connection with the arrest and trial . . ., Michigan has provided an adequate corrective remedy by appeal to the Circuit Court . . . and further appeal to the Supreme Court of Michigan." *Id.* at 725.

In the case herein, plaintiffs alleged that the defendant gave false information pertaining to material facts at the trial level. However, this does not state a cause of action pursuant to 42 U.S.C. Section 1983 of the Civil Rights Act. Regardless, if plaintiffs' allegation is true or false, their remedy is by way of appeal to the Supreme Court of Indiana pursuant to the Indiana Rules of Appellate Procedure, or pursuant to the Indiana Rules of Procedure for Post-Conviction Remedies. Thus, plaintiffs' action is improper for failure to state a cause of action.

Based on the foregoing, plaintiffs' complaint should be dismissed for failure to state a cause of action upon which relief can be granted pursuant to 42 U.S.C. Section 1983 of the Civil Rights Act.

Respectfully Submitted,

/s/ William T. Enslen
WILLIAM T. ENSLEN
Attorney for Defendant
53 Muenich Court
Hammond, Indiana 46320
Phone: 219/931-1700

(Certificate of Service Omitted In Printing)

McHIE, ENSLEN & MYERS
of Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

(Caption Omitted In Printing)

Civil Cause No. H79-140

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

(Filed Approximately December 4, 1979)

Comes now the plaintiffs, *in propria personae*, and pursuant to the forty-five (45) days granted by the Court during the preliminary hearing to this cause within which to respond to defendant's motion to dismiss, and herewith submit their response in opposition to defendant's motion to dismiss which was filed to this cause on November 23, 1979.

A memorandum to support this response is attached hereto and made a part hereof.

Respectfully submitted,

Chris P. Vickers, Sr.
Plaintiff

James N. Ballard
Plaintiff

Indiana State Prison
Post Office Box 41
Michigan City, IN 46360

(Certificate of Service Omitted in Printing)

MEMORANDUM

Plaintiffs' statement of the facts of the situation and the issue before this Court correspond to defendant's statement as set out in his opening paragraphs to his motion to dismiss, which read as follows:

> "Plaintiffs have filed a pro se complaint against the defendant, individually and in his official capacity as a police officer pursuant to 42 U.S.C. Section 1983. It is plaintiffs' contention that the defendant gave perjured testimony at their trial. As a result, they claim that their right to a trial by an impartial jury was violated and that they were deprived of due process of law. Each plaintiff believes himself to be entitled to $150,000.00 compensatory damages and $50,000.00 punitive damages.
>
> The issue before the Court herein is whether an allegation of perjury of a state's witness states a cause of action against the defendant, individually and in his official capacity as a police officer, under 42 U.S.C. Section 1983. . . . .".

Defendant thereafter cites the case of *Hurlhurst* v. *Graham*, 323 F.2d 723 (6th Cir. 1963) (hereinafter *Hurlhurst*) pursuant to which he asserts that the Sixth Circuit Court of Appeals decision to this case prohibits plaintiffs from stating a cause of action against him pursuant to 42 U.S.C. Section 1983 of the Civil Rights Act upon which relief can be granted. Contrary to defendant's summation here, plaintiffs address this issue as:

"Response to Issue I."

Secondly, defendant asserts that as opposed to seeking remedy in this Court for the alleged deprivation of their civil rights that plaintiffs' remedy lay by way of appeal to the Supreme Court of Indiana pursuant to the Indiana Rules of Appellate Procedure, or in the alternative, by way of the Indiana Trial Court of conviction pursuant to Indiana Rules of Procedure for Post Conviction Remedies.

To the first and second segments of defendant's second assertion plaintiffs address this issue as: "Response to Issue II."

RESPONSE TO ISSUE I

Hurlhurst was a case in which the defendant was initially convicted of reckless driving before a justice of the peace and subsequently filed appeal claiming perjury on behalf of various individuals in relation to his conviction. On appeal it was held that the police officers did not become liable under the Civil Rights Act merely because they had investigated the automobile accident, served a ticket upon appellant, and gave a false version of the accident.

Defendant Hunley states that *Hurlhurst* was the only case that could be found which focuses upon the issue herein. It is quite obvious that no cases could be found in support of *Hurlhurst*, for there was no authority whatever cited in support of the Court's reasoning for its decision:

> "Nor do we think that giving a false version of the accident (which plaintiff claims the officers did) would bring the case under the Civil Rights Act. If the rule were otherwise, any disgruntled litigant who lost his case in the state court could get a retrial * * * by alleging that his opponent gave a false account of the controversy." 323 F.2d 723, 725.

Plaintiffs state, however, that the concern here is not with a reckless driving case before a justice of the peace, sed a trial by a jury that resulted in the deprivation of the liberty of two persons for the remainder of their lives, largely, if not totally, based upon defendant Hunley's perjured testimony.

Defendant no doubt at this point surmises that plaintiffs' unsupported allegations as to his perjury are a dime a dozen whereas substantial facts are priceless. As follows and can be and will be proven before a jury trial to

this matter are the facts surrounding Sgt. Hunley's perjury:

Vickers and Ballard were taken under arrest to the Cedar Lake, Indiana police station on August 25, 1977. While he was there Ballard signed a waiver of rights at 1:45 p.m., made a statement to Sgt. Hunley at 1:50 p.m., signed it, and was then taken to and incarcerated in the Lake County, Indiana jail at 3:35 p.m.

Vickers signed a waiver of rights at 1:15 p.m., was taken from the Cedar Lake police station to a hospital in Crown Point, Indiana at 2:22 p.m., was treated at the hospital and returned back to the Cedar Lake police station at 5:24 p.m. Vickers then made a statement to Sgt. Hunley between the hours of 5:24 p.m. and 6:56 p.m., and did not sign the statement.

At the state criminal proceeding against Vickers and Ballard, Sgt. Hunley falsely testified under oath, and reiterated the same false testimony upon re-examination. The perjured testimony was in relation to the prior-mentioned statements and was as follows:

a) That Vickers had made his statement within a few minutes of signing his waiver of rights;

b) that Vickers and Ballard had made their statements within one half hours of each other;

c) that Vickers had made his statement and was then taken to the hospital for treatment; and

d) that Vickers had signed his statement in his (Hunley's) presence.

Plaintiffs herein assert that Hunley's perjured testimony was given so as to wrongly influence the jury to believe that they were together around the times that their statements were given, pursuant to which perjury the prosecutor remarked in his closing argument that their statements were alike because they had been together and had time to get their stories straight, thus leading the jury to the impression that the statements were of no merit to their defense, whereby the plaintiffs

were denied the benefit of due consideration that should have been focusd upon the validity of their independently made statements.

The effect that Sgt. Hunley's perjury had upon the jury was exactly what it had been preconceived to accomplish. What it had been preconceived to accomplish was to deliberately misrepresent to the jury that the matters asserted to by the statements were virtually valueless to the criminal defendants' defense in that the statements were not, in fact, made independently of each defendant's presence and influence.

More probable than not, state's witness police officer Hunley's false testimony in relation to the validity of the statements was more impressing upon the jury than were the statements themselves—made by two criminal defendants. To such an evil stated Mr. Chief Justice Warren:

> ". . . (t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 269 (1959).

Neither Vickers nor Ballard were to speak in their defense during their state criminal proceeding. As one the two independently-made statements were placed before the jury thus becoming the criminal defendants' sole opportunity to make available to that jury testimony proclaiming their innocence in relation to the charges against them, statements to be verified by analogical comparison by the jury. Had the statements remained exactly what they represented—the separately stated facts of two persons jointly charged with serious offenses, there would have been left little room for doubt that the defendants were independently telling the same truth.

The inferences to be drawn in regards to the criminal defendants' guilt or innocence in relation to their statements were to be drawn and weighed by the trier of facts—the jury. It simply was not Sgt. Hunley's task, as it is no man's task, on behalf of the state or otherwise, to present false and misleading information to the jury under oath and under color of state law. For to do so, as is the case here, is to deny an individual who is accused of a crime the fair and impartial jury trial afforded them by the Sixth Amendment to the United States Constitution as well as the due process of the Fourteenth Amendment.

And, in an attempt to circumvent the liability of the defendant's perjury that resulted in the beforementioned deprivations, the defendant claims the plaintiffs have no cause of action against him pursuant to *Hurlhurst*. Completely contradicting *Hurlhurst*, however, the United States Supreme Court has repeatedly held that the knowing use of false testimony by a state against an accused at a criminal trial offends fundamental fairness and constitutes a denial of due process of law guaranteed by the Fourteenth Amendment. *See, Miller* v. *Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967); *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959); *Alcorta* v. *Texas*, 355 U.S. 28, 78 S.Ct. 103 (1957); *Pyle* v. *Kansas*, 317 U.S. 213, 63 S.Ct. 177 (1942); *Mooney* v. *Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935).

RESPONSE TO ISSUE II

In relation to defendant Hunley's assertion that plaintiffs' relief for the deprivation of their federal constitutional rights is by way of appeal to the Supreme Court of Indiana or by way of Post Conviction Remedies to the trial court, "(i)t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is

invoked." *Monroe* v. *Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482.

Plaintiffs reiterate the fact that this is a federal civil action brought against one who violated their civil rights under the color of state law. Defendant appears unable to comprehend the situation thusly in that he repeatedly holds to the inapplicable notion of plaintiffs seeking relief from defendant by way of approaching the state courts. Were this a federal habeas corpus proceeding seeking review of the state court's denial of criminal relief (via direct appeal and/or post conviction remedies) in regards to the matter of perjury, plaintiffs would readily concede to defendant's assumption. In that this is not a habeas corpus proceeding—rather a Section 1983 action—the state's appeal and/or post conviction remedies are totally irrelevant to this action.

To the preceding authorities and facts plaintiffs state that a claim upon which relief can be granted pursuant to 42 U.S.C. Section 1983 of the Civil Rights Act has been established and the defendant's motion to dismiss should therefore be denied in this cause.

Respectfully submitted,

Chris P. Vickers, Sr.
Plaintiff

James N. Ballard
Plaintiff

Indiana State Prison
Post Office Box 41
Michigan City, IN 46360

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

(Caption Omitted In Printing)

NOTICE

(Filed December 27, 1979)

Pursuant to the Federal Magistrate Act of 1979, you are hereby notified that you have the right to consent to have a full-time United States Magistrate conduct any or all proceedings in a jury or nonjury civil matter, including trial, and order the entry of judgment.

You are further notified that upon entry of judgment by the Magistrate, an aggrieved party may appeal directly to the appropriate United States Court of Appeals from the judgment of the Magistrate in the same manner as an appeal from any other judgment of a district court. Provided, however, in accordance with the Act, that at the time of reference to the Magistrate, the parties may further consent to appeal on the record to a Judge of the district court, in the same manner as an appeal from the judgment of a district court to a court of appeals, in lieu of the direct appeal to the appropriate United States Court of Appeals.

The enclosed form labeled "Consent" provides appropriate space for either consenting or refusing to consent and *must* be signed and returned to the clerk's office in Hammond within twenty (20) days from the date of this notice.

Dated this 27th day of December, 1979.

RICHARD E. TIMMONS
Clerk

/s/ By: Victoria A. Hancock
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H79-140

(Caption Omitted In Printing)

CONSENT

(Filed Approximately January 4, 1980)

The undersigned counsel of record in the captioned cause hereby specifically consents to the trial of this civil jury or nonjury matter by the full-time United States Magistrate for this district and specifically authorizes him to conduct any or all proceedings and order the entry of judgment of the District Court in this civil matter in accordance with the Federal Rules of Civil Procedure; provided, however, that this consent shall not be deemed to preclude the United States District Judge to whom the case was originally assigned from conducting any or all proceedings herein, including trial.

The undersigned hereby declares that the foregoing consent is voluntarily made, and no attempt to persuade or induce this consent has been made by a district judge or magistrate, and client authorization has been obtained for this consent.

Signed and dated this 3 day of January, 1980.

/s/ William T. Enslen
Attorney for Sgt. J. W. Hunley
Defendant

(indicate party represented)

REFUSAL TO CONSENT

In the event you are unwilling to consent, please sign the line below and return directly to the clerk within the 20-day period prescribed in the enclosed notice.

Attorney for

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ORDER OF REFERENCE

(Filed January 7, 1980)

The following designated civil cases, pursuant to the consent of the parties, are hereby referred to the United States Magistrate for the Northern District of Indiana, for all further proceedings including trial, pursuant to the Federal Magistrate Act of 1979. Said Magistrate has previously been specially designated to exercise such jurisdiction by this court and has been certified as competent to exercise such jurisdiction by the Circuit Council of the Seventh Federal Judicial Circuit.

H 78-488 Peebly v. Conrail
H 78-290 Joslin v. Hood
H 78-320 Juachon v. Brundage
H 79-129 Corroon & Black v. Bob Anderson Pontiac
H 79-171 Parker v. Brinks, Inc.
H 76-136 Stowers v. U.S.A., et al.
H 77-185 Geary v. Consolidated Rail Corp.
H 79-140 Vickers v. Hunley

Provided however, that nothing in this order of reference shall be deemed to preclude any duly appointed and qualified judge of this court from conducting any and all proceedings including trial of the above designated cases.

Entered this 7th day of January, 1980.

/s/ [Illegible]
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H 79-140

(Caption Omitted in Printing)

NOTICE OF APPEAL

(Filed February 21, 1980)

Notice is hereby given that Chris P. Vickers, Sr., and James N. Ballard, plaintiffs herein, hereby appeals to a Judge of the United States Court for this District in the same manner as on appeal from a judgment of the district court to a court of appeals from the dismissal of their action entered by the Honorable James T. Moody on the 13th day of February, 1980.

Dated: 19th February, 1980.

/s/ Chris P. Vickers, Sr.
CHRIS P. VICKERS, SR.
Plaintiff Pro Se
Indiana State Prison
Michigan City, IN 46360

/s/ James N. Ballard
JAMES N. BALLARD
Plaintiff Pro Se
Indiana State Prison
Michigan City, IN 46360

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No.: H 79-140

(Caption Omitted In Printing)

NOTICE OF APPEAL

(Filed April 2, 1980)

Notice is hereby given that Chris P. Vickers and James N. Ballard, plaintiffs-appellants herein, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the dismissal of their action entered on the 13th day of February, 1980, by United States District Court Magistrate James T. Moody, thereafter affirmed on March 25th, 1980, by United States District Court Judge Phil M. McNagny, Jr., upon review appeal to the District Court by plaintiffs-appellants.

Dated: March 27, 1980.

/s/ Chris P. Vickers
CHRIS P. VICKERS
Plaintiff-Appellant

/s/ James N. Ballard
JAMES N. BALLARD
Plaintiff-Appellant
Indiana State Prison
Post Office Box 41
Michigan City, IN 46360

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SUPREME COURT OF THE UNITED STATES

No. 81-1404

CARLISLE W. BRISCOE, CHRIS P. VICKERS, SR., and JAMES N. BALLARD, PETITIONERS

v.

MARTIN LAHUE and JAMES W. HUNLEY, ETC.

ON CONSIDERATION of the motion of petitioners Chris P. Vickers, Sr. and James N. Ballard for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 22, 1982

SUPREME COURT OF THE UNITED STATES

No. 81-1404

CARLISLE W. BRISCOE, CHRIS P. VICKERS, SR., and JAMES N. BALLARD, PETITIONERS

v.

MARTIN LAHUE and JAMES W. HUNLEY, ETC.

ORDER ALLOWING CERTIORARI

Filed March 22, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

SUPREME COURT OF THE UNITED STATES

No. 81-1404

CARLISLE W. BRISCOE, CHRIS P. VICKERS, SR., and JAMES N. BALLARD, PETITIONERS

v.

MARTIN LAHUE and JAMES W. HUNLEY, ETC.

ON CONSIDERATION of the motion of petitioner Carlisle W. Briscoe for leave to proceed further herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 5, 1982

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Opposition

No. 81-1404

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLISLE W. BRISCOE,

Petitioner,

v.

SGT. MARTIN LAHUE,

Respondent.

CHRIS P. VICKERS, SR. and JAMES N. BALLARD,

Petitioners,

v.

SGT. JAMES HUNLEY, individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, entering judgment in favor of Respondents, is reported at 663 F.2d 713 (7th Cir. 1981),

and may also be found in the Appendix to the Petition. The unpublished Memoranda Opinions and Orders entered by the United States District Court for the Northern District of Indiana, South Bend Division, and the United States District Court for the Northern District of Indiana, Hammond Division, respectively, are also included in the Appendix to the Petition.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on 27 October, 1981. The jurisdiction for this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a police officer is entitled to absolute civil immunity under 42 U.S.C. §1983 for his testimony during a state court criminal trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983 (1976) are fully set forth in the Petition, at pp. 3-6.

STATEMENT OF THE CASES

Carlisle W. Briscoe v. Sgt. Martin LaHue

In July of 1978, Carlisle W. Briscoe filed a *pro se* complaint, charging Sgt. Martin LaHue with a violation of 42 U.S.C. §1983 in the United States District Court for the Northern District of Indiana, South Bend Division. Briscoe alleged that LaHue violated his right to due process, guaranteed by the fourteenth amendment to the United States Constitution, by, "knowingly and willfully submitt[ing] before the jury on or about March 23, 1977

false testimony and evidence concerning a false three (3) point fingerprint knowing that this print was refuted by the F.B.I. crime lab, as of no value concerning the print of the plaintiff."

In August of 1978, Briscoe filed a Memorandum in Support of Complaint setting forth the details of his complaint. Although Briscoe's complaint only mentioned LaHue's testimony at Briscoe's criminal trial, Briscoe's memorandum attempted to delineate LaHue's testimony at Briscoe's two probable cause hearings, as well.

LaHue, a police officer employed by the City of Bloomington, Indiana, was called as a witness to testify at Briscoe's two probable cause hearings and criminal trial. LaHue testified that in his opinion, a fingerprint found at the scene of the crime belonged to Briscoe. However, LaHue qualified his opinion by stating that both the Latent Fingerprint Section of the Identification Division of the Federal Bureau of Investigation and the Indiana State Police had refused to analyze the latent fingerprint, because it contained only three points. LaHue explained that both the Federal Bureau of Investigation and Indiana State Police will only analyze a fingerprint if it contains at least eleven points. (As a result of the criminal trial mentioned above, Briscoe was found guilty of the offenses of first-degree burlgary, conspiracy to commit first-degree burglary and assault. Briscoe appealed the criminal conviction. On 2 May, 1979, the Court of Appeals of Indiana reversed the conviction. *Briscoe v. State of Indiana*, 388 N.E.2d 638 (Ind. App. 1979). The Indiana Court found that there was insufficient evidence to convict Briscoe for the above named offenses.)

In October of 1978, the United States District Court for the Northern District of Indiana, South Bend Division, entered judgment for LaHue. The District Court found that (1) LaHue did not perjure himself; (2) Briscoe's complaint was defective; (3) an allegation of perjury *per se* is not

sufficient to maintain an action pursuant to 42 U.S.C. §1983; and (4) LaHue did not act under color of state law when testifying. The District Court ordered that summary judgment be entered for LaHue, that Briscoe take nothing by his complaint, and that the action be dismissed on the merits.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. The Seventh Circuit ruled that all witnesses, including police officers, are entitled to absolute civil immunity from liability pursuant to 42 U.S.C. §1983 for their testimony.

Chris P. Vickers, Sr. and James N. Ballard v. Sgt. James W. Hunley

In March of 1979, Chris P. Vickers, Sr. and James N. Ballard filed a complaint charging Sgt. James W. Hunley with a violation of 42 U.S.C. §1983 in the United States District Court for the Northern District of Indiana, Hammond Division. Vickers and Ballard alleged that Hunley violated their rights to a fair trial and due process, as guaranteed by the sixth and fourteenth amendments to the United States Constitution, by presenting allegedly perjurious testimony at Vickers' and Ballard's criminal trial.

Hunley, a police officer employed by the Town of Cedar Lake, Indiana, was called to testify at Vickers' and Ballard's criminal trial. Hunley testified that Vickers and Ballard made exculpatory statements following their arrest, during the course of the criminal trial.

Hunley filed a motion to dismiss the instant matter, which was granted by a Federal Magistrate in February, 1980. The Magistrate found that (1) Hunley had not acted under color of law while testifying (2) Hunley was entitled to absolute civil immunity as a witness and (3) alleged perjured testimony does not deprive the criminally accused of rights, privileges or immunities, unless it is known to be

false by the prosecution. Therefore, the action was dismissed for failure to state a claim upon which relief can be granted. In March, 1980, the United States District Court for the Northern District of Indiana, Hammond Division, affirmed the judgment of the Magistrate, and entered its Memorandum Decision.

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court for the same reason cited above in *Briscoe v. LaHue*.

ARGUMENT

I

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY RELIED UPON THIS COURT'S PRECEDENT AND GUIDANCE IN REACHING ITS DECISION. THEREFORE, THERE IS NO REASON FOR THIS COURT TO REVIEW THE COURT OF APPEALS' DECISION

Respondents Sgt. LaHue and Sgt. Hunley are both police officers who testified at Petitioners' criminal trials. Petitioners filed the instant actions, seeking relief pursuant to 42 U.S.C. §1983 (herein "§1983"), charging that the police officers perjured themselves at the Petitioners' criminal trials. Both actions were dismissed by the district courts. The decisions of the district courts were affirmed by the United States Court of Appeals for the Seventh Circuit (herein "the Seventh Circuit") in *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981). Relying upon this Court's precedent and guidance, the Seventh Circuit affirmed the policy of granting all witnesses, including police officer-witnesses, absolute civil immunity from §1983 liability.

The statutory language of 42 U.S.C. §1983 provides a remedy to individuals deprived of rights guaranteed by the Constitution and laws, by "every person" acting under color

of law. However, as this Court stated in *Imbler v. Pachtman*, 424 U.S. 409 (1976), "[t]he statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads. But that view has not prevailed." *Id.* at 417. As the United States Court of Appeals for the Seventh Circuit observed in *Briscoe v. LaHue*, "[a]lthough the statutory language excepts no persons from its reach, it is now settled that the draftsmen of the Act intended to incorporate into the statute certain common law immunities..." 663 F.2d at 718 (citations omitted). In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court explained, "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. In *Imbler, supra*, this Court similarly concluded that, "immunities 'well grounded in history and reason' had not been abrogated 'by convert inclusion in the general language' of §1983." 424 U.S. at 418, quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

In *Imbler, supra*, this Court suggested that a two pronged test be applied when a lower court determines whether a §1983 defendant is entitled to absolute immunity. First, the court must determine whether there is a common law history of absolute immunity. Second, the court must determine what the rationale was for this immunity at common law, and whether the public policy is still best served by continuing this grant of immunity under §1983. Thus, this Court granted absolute civil immunity to legislators (*Tenney, supra*), judges (*Pierson, supra*), prosecutors (*Imbler, supra*), and individuals performing adjudicatory functions in federal agencies (*Butz v. Economou*, 438 U.S. 478 (1978)), where the common law dictated, and public policy so required.

In the instant matter, the Seventh Circuit applied this two pronged test, and correctly determined that witnesses are entitled to absolute civil immunity from §1983 liability.

The Seventh Circuit examined English and American common law, noting that "[u]nder the English common law, witnesses have long enjoyed absolute immunity from civil liability arising from their testimony....This rule of absolute witness immunity has been incorporated into American common law...." 663 F.2d at 718 (citations omitted). Next, the Seventh Circuit examined the rationale for absolute witness immunity from civil liability, weighing competing policy arguments. The Court of Appeals struck a balance between these arguments, and determined that public policy is best served by continuing this grant of absolute immunity under §1983, for two primary reasons. First, the Court of Appeals noted that the fear of retaliatory actions, initiated by angry former defendants, "might well dissuade potential complaining witnesses from pressing criminal charges or from testifying with total candor at criminal proceedings." 663 F.2d at 720. Second, the Court of Appeals found that "[t]he rigors of cross-examination and the penalties of criminal prosecution at both the state and federal levels provide substantial checks against false testimony by witnesses." 663 F.2d at 720 (footnote omitted).

The United States Courts of Appeals for the Third, Fourth, Eighth and Ninth Circuits reached the same conclusion, after a similar analysis, in *Brawer v. Horowitz*, 535 F.2d 830 (3rd Cir. 1976), *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979), *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979), *cert. denied*, 444 U.S. 901 (1979), and *Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978). In these four cases, the courts of appeals noted the common law history of absolute witness immunity, and determined that the public policy was best served by granting witnesses absolute immunity from §1983 liability. In addition, in both *Myers* and the Seventh Circuit's decision in the instant matter, the courts of appeals looked to Justice White's concurring opinion in *Imbler v. Pachtman* for guidance. *Myers, supra*, 599 F.2d at 866; *Briscoe v. LaHue*,

supra, 663 F.2d at 721, n. 3. In his concurring opinion, Justice White discussed a witness' need for absolute immunity from §1983 liability.

> For a witness, this means he must be permitted to testify without fear of being sued if his testimony is disbelieved....Of course, witnesses should not be encouraged to testify falsely....However, if the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great.

424 U.S. at 439-440 (concurring opinion).

In addition, the Seventh Circuit relied upon this Court's recent comments in *Butz v. Economou*, *supra*, in reaching its conclusion that witnesses are entitled to absolute civil immunity from §1983 liability.

> The cluster of immunities protecting the various participants in judge supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall., at 348-49, controversies sufficiently intense to erupt in litigation are not easily capped by judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray*, *supra*, 386 U.S., at 554. Absolute immunity is thus necessary to assure that judges, advocates, and *witnesses* can perform their respective functions without harassment or intimidation.
>
> At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by

> judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. *Witnesses* are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is less pressing need for individual suits to correct constitutional error.

663 F.2d at 720-21, quoting *Butz v. Economou, supra*, 438 U.S. at 511-12 (emphasis supplied by the Seventh Circuit and footnote omitted).

In cases such as *Imbler*, *Tenney* and *Pierson*, this Court provided lower courts with substantial guidance regarding the method to determine whether a specific §1983 defendant is entitled to absolute immunity from §1983 liability. Lower courts have specifically been instructed to conduct a "careful inquiry into considerations of both history and policy....", *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748, 2755 (1981), before extending absolute civil immunity from §1983 liability to a defendant. Where a lower court conducts this "careful inquiry" into the history of the claimed immunity, and weighs competing policy considerations, the lower court's decision need not be reviewed. In the interest of judicial economy, this Court cannot review every lower court's decision regarding a specific §1983 defendant's entitlement to absolute immunity from §1983 liability. Rather, this Court need only determine that the lower court followed this Court's instructions in reaching a decision.

As discussed above, the Seventh Circuit complied with this Court's instructions in reaching its decision in the instant matter. The Seventh Circuit examined the history of absolute witness immunity, weighed competing policy considerations, and determined that public policy would be

best served by granting absolute immunity from §1983 liability to all witnesses, including police officers.

The Petitioners argue that their civil and constitutional rights will be abridged unless this Court reviews and reverses the Seventh Circuit's decision. It must be noted that this Court specifically instructed the lower courts to balance competing policy considerations. In the instant matter, the Seventh Circuit weighed the Petitioners' right to vindicate their constitutional rights against the public's interest in uninhibited testimony, free from intimidation and fear of reprisals. The Seventh Circuit correctly determined that the public's interest is more compelling than an individual §1983 plaintiff's right to pursue an action for the alleged violation of his constitutional rights.

Finally, contrary to Petitioners' argument, this Court recently addressed the question of absolute witness immunity in *Butz v. Economou, supra.* This Court's comments in *Butz* "seem deliberate and authoritative and, hence, should be regarded as dispositive." *Briscoe v. LaHue, supra,* 663 F.2d at 720. In *Butz,* this Court stated, "[a]bsolute immunity is...necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." 438 U.S. at 512.

In conclusion, the Seventh Circuit properly balanced competing policy considerations in its decision to grant all witnesses, including police officers, absolute civil immunity from §1983 liability. Therefore, this Court should deny the instant Petition.

II

THE CIRCUIT COURTS OF APPEALS ARE NOT IN CONFLICT REGARDING THE QUESTION OF A POLICE OFFICER'S RIGHT TO ABSOLUTE CIVIL IMMUNITY FROM §1983 LIABILITY FOR HIS TESTIMONY AT A STATE COURT CRIMINAL TRIAL

Petitioners claim that the United States Courts of Appeals are in conflict regarding the question of whether a police officer is entitled to absolute civil immunity from §1983 liability for his testimony at a state court criminal trial. However, all United States courts of appeals that have directly addressed the question of a witness' right to absolute immunity have held that witnesses are entitled to absolute civil immunity from §1983 liability. For example, in *Brawer v. Horowitz, supra, Burke v. Miller, supra, Myers v. Bull, supra,* and *Blevins v. Ford, supra,* the Third, Fourth, Eighth and Ninth Circuits, respectively, ruled that all witnesses are entitled to absolute civil immunity for their testimony. The Seventh Circuit in *Briscoe v. LaHue,* reached the same conclusion.

Petitioners rely upon the decisions of the District of Columbia and Sixth Circuits in *Briggs v. Goodwin,* 569 F.2d 101 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904 (1978) and *Hilliard v. Williams,* 516 F.2d 1344 (6th Cir. 1975) *cert. denied,* 423 U.S. 1066 (1976) (defendant Clark), *vacated and remanded in part on other grounds,* 424 U.S. 961 (1976), *on remand,* 540 F.2d 220 (6th Cir. 1976), for their argument that the circuits are in conflict regarding this issue. However, both *Briggs and Hilliard* are clearly distinguishable from the instant matter.

In *Briggs, supra,* the defendant, a United States Department of Justice attorney claimed that he had acted as a witness during a grand jury investigation of plaintiff's activities. Defendant therefore claimed that he was

entitled to absolute witness immunity. However, the *Briggs* court would not accept defendant's assertion that he had acted in the capacity of a witness.

> The statement assailed here was prompted by and directly incidental to, appellant's status as a prosecutor managing and administering an investigation.... It is obvious from the transcript that the court did not consider appellant to be an ordinary witness. It ordered him to take the stand; it asked him one question; and it forthwith excused him. Indeed, when appellees' counsel sought leave to cross-examine, the court denied it. The policies underlying the common law doctrine of witness immunity are tangential, and essentially irrelevant, to the question of whether appellant—a prosecutor functioning in an investigative context—should be accorded complete invulnerability to suit for the consequences of an act performed in that capacity.

569 F.2d at 26-27. Therefore, any discussion contained in *Briggs* regarding a witness' right to absolute immunity is merely *dicta*.

In *Hilliard*, the defendant police officer gave perjured testimony at the §1983 plaintiff's criminal trial at the direction of the prosecuting attorney. The *Hilliard* court found the knowing use of perjured testimony by the prosecution to be an indispensable element in the maintenance of a §1983 action. Petitioners have not claimed that the alleged perjured testimony involved in the instant matter was offered at the direction, or with the knowledge of the prosecution. Therefore, Petitioner's reliance upon *Hilliard*, to demonstrate a split in the circuits, is misplaced.

Contrary to Petitioners' argument, the United States Court of Appeals are not in conflict regarding the question of a police officer's right to absolute civil immunity for his testimony. Therefore, this Court need not review the instant matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under 42 U.S.C. §1983.

In addition to the parties listed in the caption of the case in this Court, the judgment issued by the United States Court of Appeals for the Seventh Circuit also pertained to a third case which had been consolidated with the two caes that are now before this court for review. The appellant in that third case was Charles Talley, Jr. The appellees in that case were James D. Crosson, Linda Gay, William Benson, Albert J. Jordan, Thomas E. Lief, Cyrus Yonan, Jr., Zelma L. Berger, Mr. Robbins, James W. Reilley, Jordan Bell, Marshall R. Weinberg, Lee T. Hettinger, Bernard Carey, John J. Cronin, and John Doe, No. 1.

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Spalding v. Vilas,
161 U.S. 43 (1896) 19

Spears v. Conlisk,
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Tenney v. Brandhove,
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United States ex. rel. Moore v. Koelzer,
457 F.2d 892 (3rd Cir. 1972) 23

United States v. Lee,
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Wood v. Strickland,
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United States Constitution:

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Ind. Code Ann. §34-4-16.5-18 (Burns Supp. 1977) 31

Ind. Code Ann. §34-4-16.5-5 (Burns Supp. 1977) 31

18 U.S.C. §242 35,36

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Miscellaneous:

1 B. Schwartz, Statutory History of The U.S. Civil Rights Act 597-653 (1970)..... 20

Absolute Immunity In Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 476 (1909) 30

Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977) 1203, n. 82 36

Eagle, Civil Remedies for Perjury: A Proposal for a Tort Action, 19 Ariz. L. Rev. 349 (1977) 351 34

Integrating Government And Officer Tort Liability, 77 Colum. L. Rev. 1175, 1181, n.44, 1182, n. 46 31

Kattan, Knocking on Wood: Some Thoughts on The Immunities of State Officials to Civil Rights Damage Actions, 302 Vand. L. Rev. 941, 972-73 (1977) 18

Newman, Suing The Law Breakers: Proposals To Strengthen The §1983 Damage Remedy For Law Enforcers' Misconduct, 87 Yale L.J. 447, 454 (1978) 32,36

Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials For Damages, 1981 The Supreme Court Rev. 281, 319, n.133 16

Source Book of Criminal Justice Statistics (1980) 34,35

Suing The Police In Federal Court, 88 Yale L.J. 781, 810, 811 (1979) 31,32

Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 35-6 (1980)..... 39

OPINIONS BELOW

The opinion of the court of appeals is reported at 663 F.2d 713 (7th Cir. 1981). The unpublished memoranda opinions and orders entered by the United States District Court for the Northern District of Indiana, South Bend Division, and The United States District Court for the Northern District of Indiana, Hammond Division, respectively are found in the appendix to the Petition For A Writ Of Certiorari in this case at pp. A-46, A-55, and A-67.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1981. The Petition for a Writ of Certiorari was filed on January 25, 1982, and granted on March 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Fifth, Sixth, and the Fourteenth Amendments to the Constitution of the United States. The statute involved is 42 U.S.C. §1983. Those constitutional provisions and statute are set forth at pages 3-6 of the Petition for a Writ of Certiorari.

STATEMENT

BRISCOE v. LAHUE

Petitioner Carlisle W. Briscoe (hereinafter "Briscoe") was charged in a 1976 Indiana state court criminal prosecution with the offenses of first-degree burglary, conspiracy to commit first-degree burglary, and assault. He was convicted of all charges following a jury trial in Monroe County, Indiana, Superior Court in March of 1977. Briscoe's convictions were reversed over two years later by the Indiana Court of Appeals upon a finding that the record evidence was insufficient to support his conviction. *Briscoe v. State*, 388 N.E.2d 638, 643-47 (Ind. App. 1979).

Briscoe filed a civil action under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Indiana, South Bend Division, in July of 1978. The action was filed *pro se* and prosecuted to a conclusion at the district court level without the assistance of counsel.

Briscoe's complaint (J.A. 4-6)[1] alleged that Sergeant Martin LaHue of the Bloomington, Indiana police force:

> knowingly and willfully submitted . . . false testimony and evidence [during Briscoe's trial] concerning a false three (3) point fingerprint knowing that this print was refuted by the F.B.I. crime lab, as of no value concerning the print of the plaintiff.

Briscoe characterized this as a denial of his Fourteenth Amendment right to "due process."

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[1] "J.A." refers to the Joint Appendix in this case. References to Opinions reproduced in Petition For a Writ of Certiorari and not reproduced in the Joint Appendix will be denoted by the designation "A".

Briscoe filed a "Memorandum in Support of Complaint" shortly after he filed the complaint. The memorandum was an effort to set forth Briscoe's factual and legal theories for recovery. (J.A. 8-16). Attached to the memorandum were Plaintiff's Exhibits A, B, and C which were identified as excerpts from transcripts of two probable cause hearings and his trial on the pertinent criminal charges (J.A. 17-38).

The memorandum asserted that LaHue testified falsely both before and at Briscoe's trial. Exhibit A, identified as an excerpt from the transcript of LaHue's testimony at a probable cause hearing held on September 28, 1976, revealed the following testimony by LaHue upon exmination by a county prosecutor:

Q. Would you state your full name for the record?

A. Yes, it's Martin LaHue.

Q. And the prospective defendant, Carlisle Briscoe, is that Carlisle Briscoe, Jr.?

A. Yes, it is.

Q. Are you the same Martin LaHue who appears as an affiant in the three Informations that are now before the court for consideration?

A. Yes, I am.

* * * * * * * * *

Q. And while at the scene, did you conduct an investigation?

A. Yes, we did; Sergeant Kuster handed me a piece of glass from the door of the trailer, and on this glass there was a partial fingerprint, and I took the piece of glass back to the department and raised the fingerprint, photographed the latent fingerprint and also checked the fingerprint card of Carlisle Briscoe, and found that it was a section of the right thumb of Carlisle Briscoe.

BROWN:

How certain are you that that is one and the--[24] those fingerprints doe coincide and do belong to Carlisle Briscoe?

A. It's my opinion that this is the same section that exists on the right thumb of Carlisle Briscoe; also Technician George Abbots of the Indiana State Police said it's the same.

Q. You received training and schooling in the area of fingerprinting, then?

A. Yes, I have.

Q. Approximately how many—what sort of training?

A. One week classification, one week comparison.

Q. This would be the Federal Bureau of Investigation?

A. Yes, it was.

Q. And approximately how many points would that occasion you to have, once completed?

A. At least eight, possibly more.

* * * * * * * * *

Q. And you have Briscoe's print from the McFarland residence?

A. His right thumb; yes, sir.

BROWN:

That concludes the evidence in all three matters.

Briscoe argued that LaHue received an F.B.I. crime lab report on November 2, 1976.[2] The report covered an analysis of the latent print testified to by LaHue at the

[2]The F.B.I. report was admitted in evidence at Briscoe's trial and was part of "Plaintiff's Exhibit C" to Briscoe's memorandum in support of his complaint. (J.A. 37-38).

September, 1976, probable cause hearing. LaHue had previously sent the latent print to Washington, D.C. for analysis by the F.B.I. The F.B.I. report, which was forwarded to LaHue's attention, stated, "No latent prints of value are present on the lift."

LaHue testified at a second probable cause hearing on the charges preferred against Briscoe on November 17, 1976.[3] With respect to the latent print in question, LaHue testified that the latent print was identical to a section of Briscoe's known print. He also testified that both the F.B.I. and the Indiana State Police would not express an opinion as to the identity of the latent print as being Carlisle Briscoe's print.

LaHue also testified at Briscoe's trial in March of 1977.[4] LaHue testified that he worked in the forensics unit of the Bloomington Police Department and specialized, among other things, in fingerprints. LaHue testified that he thought both the Indiana state evidence lab and the F.B.I. crime lab required at least eleven "points of identification" between a lift of a latent fingerprint and the known print of a person before they will render an opinion as to the identity of the person leaving the latent print. LaHue testified at the trial concerning his comparison of the latent print and Briscoe's known print during his examination by the prosecutor. He testified that the latent print was identical to the right thumbprint of Carlisle Briscoe. He said that the Indiana State Police and the F.B.I. returned the latent print and Briscoe's known prints upon a determination that the latent

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[3]Briscoe's Exhibit "B" was asserted to be an excerpt from this second hearing. The transcript identifies the first hearing as taking place on October 4, 1976, rather than September 28, 1976, as originally indicated.

[4]Excerpts from LaHue's trial testimony, as elicited by the prosecutor, were contained in Exhibit "C" to Briscoe's memorandum (J.A. 23-36).

print was of no value. Nonetheless, LaHue concluded his testimony by offering the opinion that there could be no more than fifty to one-hundred people in Bloomington, aside from Briscoe, who had the print characteristics of the latent print. (J.A. 31-34).

LaHue filed a "Motion to Dismiss, and Motion for Summary Judgment" with a Supporting Memorandum (J.A. 58-64). LaHue argued that: (1) his September, 1976, testimony could not be perjury because it predated LaHue's receipt of the F.B.I. lab report; (2) he was entitled to summary judgment due to the fact that a reading of his testimony shows that he did not perjure himself as a matter of law; (3) Briscoe "failed to state a cause of action" because his allegations of perjury were broad and conclusionary and were unsupported by factual allegations; (4) allegations of perjury alone are not sufficient to allege a denial of due process; (5) he was not acting under color of state law; and (6) Briscoe was "collaterally stopped by the principle of res adjudicata" as a result of his conviction in the prior criminal case.

The United States District Court for the Northern District of Indiana entered an order dated October 3, 1978, which alternately held that Briscoe had failed to state a claim upon which relief could be granted and that LaHue was entitled to summary judgment (A-46 through A-54). The district court agreed with each and every argument made by LaHue.

Briscoe appealed to the United States Court of Appeals for the Seventh Circuit. That court affirmed. The affirmance, however, was predicated on the sole ground that the allegations of perjury were insufficient to state a claim for a violation of Briscoe's constitutional right to due process of law because the court found Briscoe to be absolutely

immune from civil liability under 42 U.S.C. §1983 for testimony given in court (A-1 through A-45).[5]

VICKERS AND BALLARD v. HUNLEY

Petitioners Chris P. Vickers, Sr., and James N. Ballard filed a civil rights complaint in the United States District Court for the Northern District of Indiana, Hammond Division, in March of 1979. They alleged that respondent James W. Hunley (hereinafter "Hunley") violated their civil and constitutional rights by testifying falsely at their trial in an Indiana state criminal prosecution against them. Hunley was a sergeant in the Cedar Lake, Indiana, Police Department at the time. Vickers and Ballard (hereinafter collectively referred to as "plaintiffs") filed and proceeded *pro se* during the pendency of their action at the district court level.[6]

The factual basis for plaintiffs' claim of perjury was revealed during their pre-trial discovery efforts and eventually summarized in the "Response To Defendant's Motion To Dismiss." (J.A. 117-123).

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[5]The Court of Appeals did note that the reversal of Briscoe's conviction removed the barrier of collateral estoppel (A-6). Without specifically deciding the issue, the court also expressed dissatisfaction with any ruling that, as a matter of law, the testimony of a policeman could never be "under color of law" and asserted that such testimony may very well be under color of law if the officer's duties included testifying in order to present the results of his investigation. (A-33 and A-34).

[6]The complaint was couched in general terms and alleged that Hunley's perjured testimony violated their Sixth Amendment right to a fair trial by jury and their Fourteenth Amendment right to due process of law.

Hunley's responses to Plaintiffs' First Set of Interrogatories and Request For Admission established that plaintiffs both gave written statements to the Cedar Lake police on the day of their arrest on suspicion of the crime for which they were convicted. The statements were exculpatory in nature and allegedly similar. However, discovery responses by Hunley showed that Vickers' and Ballard's statements were given as much as five hours apart and after they had been separated. Also, Vickers had not signed his statement.

Plaintiffs alleged that Hunley testified at their trial that plaintiffs made their statements within a half hour of each other, while they were both still at the Cedar Lake police station for the first time after being arrested, and that Vickers had signed his statement in Hunley's presence.

Plaintiffs alleged that Hunley's perjured testimony allowed the prosecutor to argue to the jury that plaintiffs had been together after being arrested and had given their statements contemporaneously after they "had time to get their stories straight." Thus, the prosecutor was allowed to argue that the statements were not worthy of credibility because they were the fabricated product of an illicit collaboration by plaintiffs rather than what they actually were—corroborating and exculpatory statements made independently of each other (J.A. 120-21). Plaintiffs were found guilty and given life sentences (J.A. 119).

Hunley filed an Answer in May of 1979 which included an affirmative defense that, at the time of the facts alleged in the Complaint, he was a Cedar Lake police officer and was acting as such (J.A. 76 and 77). Hunley also asserted in his Answer that: (1) the Complaint failed to state a claim upon which relief could be granted; (2) that the matters raised in the complaint were properly the subject matter of either a direct appeal from the state criminal conviction or a separate

criminal action and, therefore, plaintiffs should be estopped; and (3) he was immune from a civil action for perjury.

Hunley eventually filed a "Motion to Dismiss" and supporting memorandum in which he argued that the complaint should be dismissed because the allegation of perjury did not state a proper claim and because plaintiffs' only remedy was to file a direct appeal or post-conviction petition attacking their convictions (J.A. 114-116).

This case was referred to a magistrate for trial (J.A. 126) and U.S. Magistrate James T. Moody entered an order dismissing the complaint on February 13, 1980 (A-55 through A-66). The dismissal was predicated upon findings that: (1) Hunley was not acting under color of state law when he was testifying; (2) Hunley was immune from civil liability under 42 U.S.C. §1983 even if he had perjured himself; and (3) no due process violation had been properly alleged because there was not an allegation that the prosecution knew that the testimony was perjured.

Plaintiffs appealed to the district court for review of Magistrate Moody's decision (J.A. 127). The district court affirmed the finding that Hunley was not acting under color of law while testifying and that he was immune from civil damages for his alleged perjury.

Plaintiffs appealed to the United States Court of Appeals which consolidated their case with the *Briscoe* case for briefing, argument, and decision. The court of appeals affirmed on the same basis indicated above for *Briscoe*.

SUMMARY OF ARGUMENT

1. The scope of both the remedies for and immunities from civil liability for violations of constitutional rights, particularly under 42 U.S.C. §1983, has been the subject of

substantial commentary by this Court during the last decade. With respect to immunities of various governmental officials from civil liability, the Court has given consideration to immunities historically accorded to those officials at common law. However, the Court has determined that not all common law immunities are to be engrafted onto actions under § 1983.

The Court has recognized in its decisions that some of the traditional common law immunity standards should be modified for two major reasons: (1) to recognize the significant distinction between a simple common law tort and the more serious species of tort involving a constitutional deprivation caused by a government official acting under the color of state law; and (2) to give effect to the dual purposes of 42 U.S.C. § 1983, which are to compensate victims of constitutional deprivations and to deter government agents from further violations.

The Court has determined that qualified good-faith immunity, rather than absolute immunity, should be the predominant standard. Qualified immunity best accomplishes the purposes of § 1983 without subjecting government officials to the spectre of unjust damages awards.

Absolute immunity has been preserved in a few instances but only where the "governmental decision-making process" is intimately involved in the questioned activity. Testimonial acts do not involve decisionmaking or discretion and, therefore, should not be accorded this type of immunity.

2. The legislative history of the 1871 Civil Rights Act, Section 1 of which became § 1983, shows that Congress wanted to curb the use of prejury. Therefore, it is consistent with legislative intent to allow a civil action in damages for perjury.

3. The policy reasons for common law absolute immunity of witnesses from civil liability for perjury do not apply with

the same force to police officers who testify as they do to lay witnesses. Testifying in criminal prosecutions is a significant duty of investigatory law enforcement agents. Economic protections are provided to them through insurance and indemnification. These factors distinguish them from lay witnesses and eliminate the need for absolute immunity.

4. Other disincentives to perjury do not provide adequate deterrent value against perjury. Further, the fact that certain protections are inherent in the judicial process does not blunt the need for redress in the form of a civil damages remedy for perjurious testimony given by a police officer.

ARGUMENT

I.

RECENT DECISIONS OF THIS COURT DICTATE THAT A POLICEMAN WHO PERJURES HIMSELF SHOULD BE ACCORDED ONLY A QUALIFIED GOOD-FAITH IMMUNITY

This Court made reference in *Butz v. Economou*, 438 U.S. 478, 484 (1978), to the "evolving area" of constitutional claims and the scope of immunities accorded government officials from those claims. Recognition of the fluid state of the law in this area stems from the close relationship between the due process clauses of the Fifth and Fourteenth Amendments[7] and actions brought pursuant to 42

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[7] ". . . *nor shall any State deprive any person of life, liberty, or property, without due process of law* . . ."

U.S.C. §1983[8] or directly under the Fifth Amendment.

This Court cited with approval in *Ingraham v. Wright*, 430 U.S. 651, 675 (1977), Justice Frankfurter's comment that:

> " '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess . . . ." *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

A. During The Last Decade This Court Has Expanded The Scope Of Civil Remedies For Constitutional Violations And Contracted The Scope Of Official Immunities.

The last decade has seen the development of a well-defined line of precedent granting rights of action to those who have been the victim of constitutional deprivations at the hands of government officials. Federal causes of action have been recognized for violations of rights under the Fourth,[9] Fifth,[10] and Eighth Amendments.[11] Remedies

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[8] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[9] *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

[10] *Davis v. Passman*, 442 U.S. 228 (1979).

[11] *Carlson v. Green*, 446 U.S. 14 (1980).

under §1983 for violations of statutory rights, aside from constitutional rights, were recognized in *Maine v. Thiboutot*, 448 U.S. 1 (1980).

The Court's recent decisions, conversely, have led to an overall contraction of common law immunities from damage actions for violations of civil and constitutional rights. The Court's decisions were reached after considered inquiries into immunities historically accorded various government officials at common law and the reasons for them. *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). However, the Court has made it clear that inquiries into common law immunities are only the starting points for analysis of whether a common law immunity should be extended to §1983 lawsuits.

> One important assumption underlying the Court's [§1983 immunity] decisions . . . is that members of the 42d Congress were familiar with common law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common law principles to obtain, absent specific provisions to the contrary.
>
> At the same time, the Court's willingness to recognize certain traditional immunities as affirmative defenses has not led it to conclude that Congress incorporated all immunities existing at common law. *See, Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974). Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat any promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of §1983. See *Imbler v. Pachtman*, 424 U.S., at 424 id., at 434 (concurring opinion); *Owen v. City of Independence*, 445 U.S. 638. Only after careful inquiry into considerations of both history and policy has the Court construed §1983 to incorporate a particular immunity defense. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981).

This Court determined in *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974), that final resolutions of immunity questions must not be made without reference to the purposes of §1983.

B. The Primary Purpose Of §1983 Is To Compensate Victims Of Violations Of The Constitutional Right To Due Process Of Law Under The Fourteenth Amendment By Persons Acting Under Color Of State Law. Recognition Of This Purpose Has Led To The Adoption Of Qualified Good-Faith Immunity, Rather Than Absolute Immunity, As The Predominant Standard Relating To Affirmative Defenses.

Section 1983 has been recognized as having given birth to a new "species of tort." *Imbler, supra*, at 424 U.S. 417. That "species" is best known as the "constitutional tort." As Justice Harlan stated in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 196 (1961):

> The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter, is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings.

* * * *

> It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

A decade after the decision in *Monroe v. Pape* this Court once again emphasized the significance of government involvement and the transformation of a common law tort into its more serious species, the constitutional tort. The *Bivens* decision reemphasized the point by stating:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.
>
> * * * *
>
> And "where federally protected rights have been invaded, it has been the role from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (*Bivens v. Six Unknown Agents*, 403 U.S. at 391-92).

Justice Harlan echoed his pronouncement in *Monroe* by writing in a concurring opinion in *Bivens:*

> On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. (403 U.S. at 409)

More recently the Court has indicated directly how significant a constitutional tort is, when compared to a common law tort:

> Accepting this extension of immunity with respect to state tort claims, however, we are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution. (*Butz v. Economou*, 438 U.S. at 495).

The Court has extended immunities to certain categories of government officials. These include judges,[12] prosecutors,[13] and legislators.[14] However, absolute immunity was extended to § 1983 only in cases of officials with the widest discretion and greatest decisionmaking powers of almost all government officials. The Court reserved the possibility of absolute immunity in other "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Butz v. Economou*, 438 U.S. at 507. However, it has been observed that:

> It seems reasonable to assume, however, that if the activities of a Governor of a State engaged in dealing with "mob rule" and those of the Secretary of Agriculture engaged in law enforcement activities do not qualify as "essential for the conduct of public business," this exception will remain a dead letter.[15]

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[12]*Pierson v. Ray*, 386 U.S. 547 (1967).

[13]*Imbler v. Pachtman*, 424 U.S. 409 (1976).

[14]*Tenney v. Brandhove*, 341 U.S. 367 (1951).

[15]Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials For Damages*, 1981 The Supreme Court Review 281 at 319, n. 133.

With the few exceptions noted, the Court has accepted the qualified good-faith immunity standard as the predominant one in dealing with affirmative defenses to §1983 actions. This is the applicable standard for policemen (*Pierson v. Ray, supra),* F.B.I. agents (*Bivens v. Six Unknown Agents, supra*), state executive officials (*Scheuer v. Rhodes, supra*), federal executive officials (*Butz v. Economou, supra*), school board officials. (*Wood v. Strickland,* 420 U.S. 308 (1975)), prison officials (*Procunier v. Navarette,* 434 U.S. 555 (1978)) and superintendents of state hospitals (*O'Connor v. Donaldson,* 422 U.S. 563 (1975)).

The Court demonstrated in *Wood v. Strickland* that the qualified good-faith immunity is the result of a balancing test which seeks to give effect to the purposes of §1983 but does not unduly burden or hinder a public official from exercising his duties or being subjected to unjust damages awards. The Court unanimously rejected absolute immunity for school officials by finding that it "... would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." 420 U.S. at 320. The Court commented on the balancing test inherent in the qualified immunity standard and defined its boundaries by stating:

> Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of §1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the

> action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the students. That is not to say that school board members are "charged with predicting the future course of constitutional law." (Citation Omitted) A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. (420 U.S. at 322).

The Court has now reached the point where it has explicitly acknowledged that ". . . qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations." ***Butz v. Economou,*** 438 U.S. at 508. In reaching the present juncture in civil rights litigation, the Court has wrought significant changes in the scope of the immunity accorded certain officials at common law when the Court considered certain types of tortious activity in the constitutional tort context.

State executive officials were historically accorded, at least in certain situations, absolute immunity at common law for actions in tort.[16] However, the decisions in *Scheuer v. Rhodes* and *Wood v. Strickland* clearly altered the scope of immunity when the immunity defense was raised in the constitutional tort context.

Similarly, federal executive officials were normally accorded absolute immunity from common law tort actions.

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[16]Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions,* 302 V and L. Rev. 941, 972-73 (1977).

Spalding v. Vilas, 161 U.S. 43 (1896); *Barr v. Matteo*, 360 U.S. 564 (1959). However, when the absolute immunity prescribed by *Spalding* and *Barr* was tendered as a complete defense by federal executive officials in a suit brought for alleged violations of Fifth Amendment rights, the Court specifically declined to extend the absolute immunity to the constitutional tort context and contracted the scope of executive immunity from absolute to qualified in the constitutional context.

II

THE LEGISLATIVE HISTORY OF §1983 INDICATES THAT PERJURY WAS A SIGNIFICANT CONCERN LEADING TO THE ENACTMENT OF THE 1871 CIVIL RIGHTS ACT. CONSEQUENTLY, THE LEGISLATIVE HISTORY INDICATES THAT THE EXTENSION OF ABSOLUTE IMMUNITY TO THE COMMISSION OF PERJURY DURING STATE COURT TRIALS WOULD CONFLICT WITH THE LEGISLATIVE INTENT OF THE 42ND CONGRESS

In considering questions relating to the scope of liability under §1983 and the scope of related official immunities, this Court has consistently analyzed the intent of the 42nd Congress in its enactment of the 1871 Civil Rights Act, Section 1 of which became 42 U.S.C. §1983.

The court of appeals below found that perjury was a prominent concern of the 42nd Congress in enacting the 1871 Act. The court stated:

> Another consideration militating against absolute immunity lies in the fact that abuse of the judicial process generally, and perjury and subornation of perjury specifically, appear to have been prominent concerns prompting enactment of the 1871 Act by the 42nd Congress. *See generally* 1 B. Schwartz, Statutory History of The United States: Civil Rights 597-653 (1970) (setting forth the legislative history of the 1871 Act). To afford witnesses absolute immunity from §1983 liability might thus frustrate one of the purposes of the Act. (*Briscoe v. LaHue,* 663 F.2d at 720).

The congressional debates contain numerous references to the evils of perjury, which was considered to be widespread in the courts of the Southern states during the reconstruction period. A major concern of the Congress in the passage of the 1871 Act was the inability of the state courts to gain convictions against members of the Ku Klux Klan. One of the great hurdles to these convictions was the commission of perjury. Representative Stoughton of Michigan asserted that the Ku Klux Klan:

> . . .not only binds its members to execute degrees of crime, but protects them against conviction and punishment, first by disguises and secrecy, and second, *by perjury, if necessary, upon the witness-stand* and in the jury-box. (Emphasis added) (*Schwartz, supra,* pp. 599-606).

Stoughton referred to the testimony of James Boyd, a confederate soldier, who said:

> one of the obligations and intentions of the organization [was] that *a person on the witness-stand* or in the jury-box *should disregard his oath* in order to protect a member of the organization. (Emphasis added) (*Schwartz, supra* at 600).

Other references to perjury in the debates can be found in *Schwartz, supra,* at 603 and 625.

III.

THE ABSOLUTE IMMUNITY FROM CIVIL LIABILITY HISTORICALLY ACCORDED TO WITNESSES DOES NOT APPLY EQUALLY TO POLICEMEN TESTIFYING AS PART OF THEIR OFFICIAL DUTIES. BECAUSE ABSOLUTE IMMUNITY WOULD THWART THE PURPOSES OF §1983, POLICEMEN SHOULD BE GRANTED ONLY QUALIFIED IMMUNITY FOR TESTIMONY THEY GIVE AS PART OF THEIR DUTIES

A. Policemen Are Acting Under Color State Law When They Testify As A Part Of Their Duties And When The Content Of Their Testimony Relates To The Execution Of Their Duties

The solicitous concern for the preservation of constitutional guarantees that has been evidenced by recent decisions of this Court pertaining to §1983 is equally applicable, under certain circumstances, to instances when police officers testify during the course of state court criminal proceedings. When certain factors pertaining to this testimony are present, the conclusion is inescapable that the officers are testifying under the color of state law, as that term is employed in §1983.

The most obvious element of this analysis is the status of a police officer as a state law enforcement agent. When a policeman testifies during the course of the criminal trial, he invariably identifies himself as a law enforcement officer. Oftentimes he will be testifying in full uniform. These factors show that a policeman offering testimony is doing so under "the badge of state authority" in a classic sense.

Of course, the analysis cannot stop here. Numerous decisions have held that the status of a person as a state official does not, by itself, establish that a person charged with wrongdoing was acting under the color of state law.[17]

When a police officer, however, is called by the state to give testimony in support of its prosecution, the policeman's testimony puts him in a representative capacity for the state.[18]

It can hardly be disputed that police officers assigned to the investigation of felonies are required, as a part of their regular duties, to testify to the results of their investigations. The fact that the obligation to testify is a part of such a policeman's regular duties is seldom indicated, however, by a state statute.[19] More often than not, such a duty is dictated by internal police department regulations or simply by custom and practice. When a policeman testifies pursuant to such a duty, the fact that the testimony is given under the color of state law is further confirmed. It is likely that the

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[17]Indeed, a policeman might be called to testify about events he observed while he was off duty and not acting in his official capacity. In this case, a police officer could only be considered a pure "occurrence witness" and not acting as a representative of the state. It would similarly be true that a police officer called on behalf of the defense, rather than in support of the state's case, might not be acting under the color of state law.

[18]This "representative capacity" is further emphasized when the police officer is the "case agent" assigned to be the principal assistant to the local prosecutor during the entire trial, even when all other witnesses are excluded, and assists the prosecutor during the course of the proceedings. It appears that Hunley acted in such a capacity during the prosecution of Vickers and Ballard (J.A. 91, Answer to Plaintiffs' Interrogatory No. 11).

[19]*See generally, Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938) at 139.

police officer will be called upon to testify regarding what he observed, heard, and did as a result of his investigative duties. In such situations, the policeman's testimony is only a logical extension of his other investigatory duties which would not be completed until the police officer has testified to the results of his investigation.[20]

Other federal courts have reached the conclusion that law enforcement official witnesses are civilly liable for committing perjury upon the clear assumption within those decisions that the officers, in testifying before a judicial tribunal, were doing so as a part of their official duties and pursuant to governmental authority.[21]

The record in this matter reveals that LaHue and Hunley met most, if not all, of the above prerequisites to a determination that their testimony during the course of petitioners' trials was given under the color of state law. LaHue and Hunley identified themselves as policemen during the course of the trials in question. LaHue and Hunley were both called by the prosecutor to support the state's case.[22] LaHue and Hunley both testified as to what they did, heard, and observed in the execution of their investigatory duties. It is certain that LaHue's and Hunley's responsibilities included the obligation to testify about the results of their investigations. Their respective testimonies related directly to their investigatory activities.

That respondents were acting under the color of state

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[20]*Id.* at 140.

[21]*See, Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970); *U.S. ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *Spears v. Conlisk*, 440 F. Supp. 490 (N.D. Ill. 1977).

[22]At least in the case of Hunley, the policeman also acted as the "case agent", remaining in the courtroom and sitting next to the prosecutor during the entire trial.

law was admitted by Hunley who asserted as his "Third Defense" in his answer to the complaint that, at the time of the acts alleged in the complaint against him, he was a Cedar Lake, Indiana police officer and acting as such at the time (J.A. 77).

Without specifically deciding the question, the court of appeals below noted that LaHue and Hunley argued that their motions to dismiss were properly granted by the district courts because they were not acting under color of state law, as required by § 1983, when they were testifying. The court evinced skepticism with this argument by stating that this certainly was not true as a matter of law and that, under certain circumstances, the testimony would be considered as having been given under color of law. 663 F.2d at 721, n.4.

B. Absolute Official Immunity Has Been Reserved For Activities Categorized As Governmental Decisionmaking. Testimony At Trial Does Not Involve Decisionmaking Or Discretion. Consequently, The Activity Of Testifying Should Not Be Accorded Absolute Immunity.

This Court has extended absolute immunity to legislators, judges, and prosecutors. A very high level of discretion is inherent in the activities of these government officials. However, the Court's recent decisions relating to the scope of official immunity lead to the conclusion that it is not discretion, by itself, that is the touchstone leading to a finding of absolute immunity. As the Court stated in *Scheuer v. Rhodes*, 416 U.S. at 247:

> . . . in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office in all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

A reconciliation of this Court's decisions granting absolute immunity with its decisions granting qualified immunity results in the observation that when the scope of discretion inherent in a particular governmental activity becomes so high as to actually involve decisionmaking, the scope of the pertinent official immunity will be said to be absolute.

In the case of legislators, it is clear that they are called upon not only to exercise discretion but to make actual decisions regarding the common good of their constituents. They must actually decide whether to vote in favor of or against legislation which could impact upon the citizenry of an entire state.

The other instances where this Court has extended absolute immunity to government officials have been the cluster of immunities that have been characterized as "judicial" or "quasi-judicial." *See, Pierson v. Ray*; *Imbler v. Pachtman*; *Butz v. Economou, supra*. A study of these decisions indicates that it is concern for the protection of the "governmental decisionmaking process" that leads to a finding of absolute immunity. A study of both the opinion of the Court and the concurring opinion of Justice White in *Imbler v. Pachtman* confirms this observation.[23]

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[23] "The function of a prosecutor that most often invites a common-law tort action is his *decision* to initiate a prosecution, as this may lead to a suit for malicious prosecution if the state's case misfires. 409 U.S. at 421. ". . . [A] prosecutor inevitably makes many *decisions* that could engender colorable claims of Constitutional deprivation." 409 U.S. at 425. "In justifying absolute immunity for certain officials . . . courts have invariably rested their decisions on the proposition that such immunity is necessary to protect the *decisionmaking process* in which the official is engaged." 409 U.S. at 435. "Thus, unless the threat of suit is also thought to injure the *governmental decisionmaking process*, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question." (Emphasis added) 409 U.S. at 437.

This Court has recognized that certain participants in judicial proceedings other than judges are, by the nature of their activities, absolutely immune because the function of their activities so closely approximates the decisionmaking efforts of a judge.

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. (*Imbler* at 424 U.S. 423-24).

The Court commented upon the pertinent duties as follows:

> Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials—judge, grand juror, and prosecutor—exercise a discretionary judgment on the basis of evidence presented to them. (Citations omitted). It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being "quasi-judicial" as well. (424 U.S. at 422-23).

LaHue and Hunley, although governmental officials, were not engaged in the "governmental decisionmaking process" when they testified at petitioners' trials. Police officers, in executing many of their duties, are clearly required to exercise discretion. Discretion is nearly always involved in the decision to take a suspect into custody, to make a search or seizure, or to employ certain other investigatory techniques in attempts to solve crimes. Nevertheless, this Court decided in *Monroe* and *Pierson* that policemen would be granted only qualified immunity for such acts.

Testimonial acts, however, do not involve discretionary activity. A witness is sworn "to tell the truth and nothing but the truth." It is a witness' unalterable duty to give complete

and honest answers to questions put to him on the witness stand. Other courts have consistently recognized the absence of discretion relating to the giving of testimony.

A Justice Department attorney was alleged to have perjured himself during the course of a judicial proceeding in *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977). The court disagreed with the attorney's argument that he was absolutely immune from civil liability for his testimony as part of his prosecutorial "quasi-judicial" immunity. The court dispensed with this argument by stating:

> But appellant's alleged perjury bears no relation whatever to the advocate's role as conceived by the Supreme Court in *Imbler*. The obligation to disclose, pursuant to judicial direction, the presence of Government informants among those subpoenaed to testify before the grand jury is entirely foreign to advocacy issues such as whether to initiate a prosecution or how to conduct a prosecution once begun. (569 F.2d at 21)

The court of appeals below recognized the absence of discretion as militating in favor of civil liability for the giving of testimony. The court commented upon this situation by stating:

> [A] witness, at least in theory, exercises no discretion in the performance of his duty to answer fully and truthfully all the questions put to him . . . But in those cases granting absolute immunity in the § 1983 context, the need to protect the fearless exercise of *discretion* has been a paramount consideration . . . Because witnesses do not exercise similar discretion, the need for absolute immunity seems correspondingly less compelling. (Court's emphasis) (663 F.2d at 719-20).

In her dissenting opinion in *Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982), Judge Kravitch stated:

> Such an immunity [qualified] should also extend to a police officer who testifies within the scope of his duties.

> The discretion a police officer exercises in testifying as a witness is certainly no greater than that which he exercises in making an arrest or conducting a search. In fact, it is much less. (665 F.2d at 668).

The complete absence of a decisionmaking process or other discretionary activity in testifying in a judicial proceeding removes the testimonial act from the category of activities that have been accorded absolute immunity from §1983 actions by this Court.

C. The Public Policy Considerations Underlying Common Law Absolute Witness Immunity Do Not Apply Equally To Situations Where Police Officers Are Witnesses

Section I of this brief elaborated on the distinctions to be drawn between immunities normally accorded public officials at common law and the immunities granted to government officials when the alleged tortious activity is constitutional in its dimension. Perhaps this reason, more than any other, counsels the withholding of the absolute immunity normally accorded to witnesses at common law. However, there are numerous practical considerations that further counsel this result.

1. Significant Policy Considerations Differentiate The Police Officer Witness From The Lay Witness

The normal lay witness has no duty to testify. Thus, policy considerations dictate that immunity be granted to lay witnesses in order to encourage their voluntary participation in the judicial process so that complaints may be fully aired.

However, as the court of appeals indicated below, it may very well be that it is a duty of a police officer, in certain circumstances, to testify in a criminal proceeding in order to complete his investigatory duties.[24]

There is another significant distinction between the lay witness and the police officer witness. The distinction was alluded to by Judge McGowan in his opinion for the court in *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977):

> Whatever is the precise nature of the immunity accorded to witnesses at common law, that immunity applies without distinction to any *individual* serving as a witness in a judicial proceeding. On the other hand, where a constitutional infringement is alleged, the defendant-witness will almost invariably be a *Government Official*. (At minimum the "under color of law" requirement will assure some direct government involvement in the challenged testimony.) This is a crucial difference. Policy considerations counselling the insulation of private *citizens* from civil liability arising from their performance as witnesses do not apply with equal force when a Complaint charges that Constitutional rights have been violated by a *public employee* operating from the witness stand. (Court's emphasis) (569 F.2d at 28).

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[24]It should be noted that neither of the district courts in the *Briscoe* or *Vickers* cases addressed the question of whether testifying in court was one of the duties of LaHue or Hunley. The fact that no consideration of the facts necessary to reach a determination on this point was given in the *Vickers* case is apparent in that the court granted a motion to dismiss the complaint without any reference to collateral factual material. The same observation holds true in the *Briscoe* case. Although the decision of the district court was, at least, in part, in the form of summary judgment, it should be noted that no collateral factual material was reviewed by the court in reaching its determination that LaHue was not acting under the color of state law. Both decisions were violative of the often-cited principle of *Conley v. Gibson*, 355 U.S. 41 (1957) that no complaint should be dismissed unless the court is convinced that there is no set of facts under which the plaintiff can recover.

This Court recognized in *Bivens* that government agents possess power and authority unique to the auspices of a government and which far exceed that of a private citizen. "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392. "The Badge of Authority" that a policeman carries with him into the courtroom when he testifies identifies him to the average citizen as a person to be granted respect and credibility as a result of his position of authority within the community. When such a person violates his oath to tell the truth, it is very likely that a trier of fact will be misled more significantly than in a case of a lay witness who did not come to the courtroom cloaked with the authority of a police officer.

Another reason frequently given for absolute immunity to witnesses at common law was that the potential for civil liability might be an intimidating factor that would dissuade witnesses from testifying. Veeder, *Absolute Immunity In Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 476 (1909). However, this policy consideration, which may have been the most significant consideration leading to the common law immunity, is much less compelling, if not totally absent, in the case of police officers who testify.

First, police officers are potentially liable for many of their normal duties. *See Monroe v. Pape*; *Pierson v. Ray*, *supra*. The court below recognized this fact:

> But it may be that public officials, who in any event face the possibility of liability for most of their official acts, who may be obligated to testify as an aspect of their official duties, and who are normally represented by government counsel in §1983 actions, would be less intimidated than a lay witness by the threat of a §1983 action. (663 F.2d at 719)

Contrary to lay witnesses, police officers are often relieved of the economic burden of personal liability through the auspices of municipal liability insurance and indemnity legislation. This Court has recognized this fact:

> But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members, and employees. (*Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 713 (1978) (Powell, J., concurring).[25]
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> No doubt innumerable municipal insurance policies and indemnity ordinances have been founded on this assumption [good faith immunity of municipalities] (*Monell, supra*, at 717) (Rehnquist, J. dissenting).

It has been well documented that police officers are frequently insulated from economic hardship as a result of insurance policies and indemnity statutes. This is true in the case of police officers, such as respondents, in the State of Indiana,[26] as well as many other jurisdictions.

Further, studies have confirmed the common sense observation that the threat of personal liability in § 1983 lawsuits brought against police officers is also reduced as a result of the disparity between the general public's sympathy for police officers and lack of sympathy for civil rights plaintiffs. Studies have documented substantial jury bias in favor

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[25] *See, Suing The Police in Federal Court*, 88 Yale L. J. 781, 810, 811 (1979); Berman, *Intergrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1181, n. 44, 1182, n. 46. *See particularly, Ind. Code Ann.* § 34-4-16.5-18 (Burns Supp. 1977) and *Ind. Code Ann.* § 34-4-16.5-5(b) (Burns Supp. 1977).

[26] *Id.*, Ind. Code Ann.

of the police and against civil rights plaintiffs in police misconduct suits.[27]

2. The Common Law Tradition Of Witness Immunity, Particularly With Respect To Law Enforcement Witnesses, Has Not Been Embraced By The American Judicial System With The Same Unanimity As Other Absolute Common Law Immunities

There is no doubt that the roots of witness immunity can be traced to the sixteenth century in England. The same holds true for common law judicial immunity. However, this Court recognized absolute judicial common law immunity 110 years ago in *Bradley v. Fisher*, 13 Wall 335 (1872). The Court commented on the holding in *Bradley v. Fisher* in *Butz v. Economou*:

> The Court began by noting that the principle of immunity for acts done by judges 'in the exercise of their judicial functions' has been 'the settled doctrine of the English Courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.' 18 Wall., at 347 (438 U.S. at 508).

It is clear, however, that the common law witness immunity has not been embraced by the American system with the unanimity accorded to judicial immunity. This is particularly true in the advent of §1983 and *Bivens*-type actions. The Courts of Appeals for the District of Columbia Circuit (*Briggs v. Goodwin, supra*) and the Sixth Circuit (*Hilliard v. Williams*, 416 F.2d 1344 (6th Cir. 1975)) have

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[27]Newman, *Suing The Law Breakers: Proposals To Strengthen The Section 1983 Damage Remedy For Law Enforcers' Misconduct* 87 Yale L. J. 447, 454 (1978); *Suing The Police in Federal Court*, 88 Yale L. J. at 783-85, 798, 800, 802.

declined to extend absolute witness immunity to the constitutional tort context. Although the Fourth Circuit (*Burke v. Miller*, 480 F.2d 208 (4th Cir. 1978)) and the Fifth Circuit (*Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982) have extended witness immunity to the constitutional tort context, both decisions evoked sharp dissenting opinions.

The decision in the court of appeals below was a searching one in which the Court felt bound by language contained in this Court's decision in *Butz v. Economou*.[28] The court of appeals seemed to find more reasons counseling against the extension of common law witness immunity to the constitutional tort context than reasons favoring the extension. 663 F.2d at 718-21.

Another frequently cited reason for the common law witness immunity has been the encouragement of full disclosure and freedom of expression. Although full disclosure and freedom of expression are to be encouraged, the desire to achieve these goals would not be sufficient, in the case of police officers whose duties include the obligation to testify, to call for the abolition or denial of civil liability for perjury.

As has been argued previously, the goal of full disclosure by witnesses is subsumed in the oath extracted from every witness who testifies in a judicial proceeding. However, this policy consideration appears to be predicated upon an assumption that, in the absence of absolute immunity, there will not be full disclosure. However, in the case of a police officer who is called by the state to support its prosecution, the officer must attend the hearing. Further, it must be presumed that the only objective of his appearance is to offer

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[28]The court of appeals, in essence, admitted that the pertinent language was in the nature of *obiter dicta* by indicating that the language was "not controlling." 663 F.2d at 720.

evidence in support of the state's case. It would be anomalous to assume that the police officer witness would not provide full disclosure when the very nature of his appearance is to provide damaging testimony against the criminal defendant.

D. Potential Criminal Perjury Or Civil Rights Prosecutions Are Not Sufficient To Deter Perjury. In Any Event, The Addition Of Civil Liability To These Other Forms Of Punishment Will Not Unduly Discourage Police Witnesses.

These alternatives to a civil remedy for perjury are ineffective and insubstantial for several reasons. The first of these is predicated upon the simple observation that studies have shown that there are very few criminal proceedings for perjury.

> Indeed, instigation of a criminal proceeding for perjury is rare: of 41,108 federal prosecutions commenced in the United States district courts during the fiscal year 1975, only 225 were for perjury.[16] Actual imprisonment after a conviction for perjury is virtually nonexistent: Of approximately 20,000 prisoners in federal institutions on June 30, 1968, only two were sentenced for perjury.[17] The criminal laws against perjury apparently are a small obstacle to the individual contemplating such an act. (Eagle, *Civil Remedies for Perjury: A Proposal for a Tort Action*, 19 Ariz. L. Rev. 349 (1977) at 351).

See also, Source Book of Criminal Justice Statistics (1980), U.S. Department of Justice, Bureau of Justice Statistics.

The *Source Book* indicates that for the year ending June 30, 1979, only 152 felony perjury cases were disposed of in

U.S. district courts. Of these, only 56 of the defendants were found guilty and imprisoned for any period of time.

This Court has also noted the potential for deterrence of official misconduct through the criminal analog of §1983, 18 U.S.C. §242. However, the *Source Book of Criminal Justice Statistics (1980)* showing the numbers of defendants sentenced in U.S. District Courts for the year ending June 30, 1979, shows that only 46 defendants were sentenced for criminal civil rights violations. Of that 46, only 25 were sentenced to prison.

The above statistics show that the concern expressed by Justice White in his concurring opinion in *Imbler v. Pachtman* regarding censorship of testimony might be more theoretical than real. Justice White solicitously observed, "However, if the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great." 424 U.S. at 439-40. It would appear that the deterrent provided by criminal laws against perjury mentioned by Justice White may be minimal as a result of the small number of perjury prosecutions.

Assuming, as Justice White did in *Imbler*, that criminal prosecution for perjury is a strong deterrent, in that it could lead to imprisonment, the residual deterrent effect of a potential civil sanction would be minimal. It is difficult to conceive of a situation where a witness, notwithstanding the criminal perjury laws, would be willing to risk his personal freedom in order to perjure himself but would not be willing to risk civil liability if that sanction were added to the threat of imprisonment. As Judge Winter said in his concurring opinion in *Burke v. Miller*:

> And I question whether a witness willing to commit perjury and to risk prosecution would absolutely be deterred by the threat of a civil suit. These are problems that I find difficult to resolve. Certainly the majority does not persuade me that they are resolved correctly. (580 F.2d at 112).

The fact that the Court in this case is confining its consideration to the question of whether police officers should be subject to civil liability for perjury further counsels against the concern that, when civil liability is added to potential criminal liability for perjury, "the risk of self-sensorship is too great." This conclusion springs from the observation that, in the case of police officers who testify in support of a state's criminal prosecution, the likelihood that they will be threatened with a criminal perjury prosecution is nearly non-existent. Judge Newman wrote in his article, *Suing the Law Breakers,supra*, that:

> [T]he criminal sanction will never have significance as a deterrent. Its use is bound to be sporadic at best. Prosecutors, who need to maintain close working relationships with law enforcement agencies, are disinclined to charge police officials with criminal conduct. (87 Yale L.J. at 449-50).

With respect to the application of criminal civil rights sanctions, it has been stated:

> While § 242 applies to judges and prosecutors . . . its operation as a deterrent to unconstitutional behavior is highly dubious, since the government itself must initiate prosecution, and there are no modern cases reported of judges or prosecutors actually being subject to its liability. (*Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133 (1977) at 1203, n. 82).

The closeness with which local prosecutors and municipal

police officers are required to work in the investigation and prosecution of crime indicates that the deterrent value of criminal civil rights sanctions is equally dubious, whether applied to policemen, judges, or prosecutors.

IV.

THE SIGNIFICANT POLICY CONSIDERATIONS UNDERLYING §1983 WILL BE ADVANCED IF POLICE OFFICERS ARE NOT ABSOLUTELY IMMUNE FROM CIVIL DAMAGES FOR TESTIFYING FALSELY IN STATE CRIMINAL PROCEEDINGS

This Court recognized in *Monroe v. Pape,* that one of the three major purposes of the enactment of the Civil Rights Act of 1871 was to provide a remedy where state law was inadequate. 365 U.S. at 173. Resort to state tort law conclusively shows that the petitioners in this case would have no redress for the alleged perjury of respondents due to the state adoption of absolute witness immunity at common law. Consequently, the provision by this Court of a remedy under §1983 for perjurious testimony will advance one of the major goals at the time of §1983's enactment.

This Court has recognized that compensation to the victim of constitutional violations was perhaps the primary purpose of the passage of §1983.

> "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law made possible only because the wrongdoers were clothed with the authority of state law.'" *Monroe v. Pape*, 365 U.S. 167,... (*Owen v. City of Independence, Mo.*, 445 U.S. at 650 (1980).

As the court of appeals stated below:

> To afford witnesses absolute immunity from §1983 liability might thus frustrate one of the purposes of the Act. Moreover, absolute immunity, wherever it is recognized, necessarily overrides §1983's fundamental purpose of compensating individuals for deprivations of federal statutory and constitutional rights. (663 F.2d at 720).

See, also, Carey v. Piphus, 435 U.S. 247 (1978).

A further salutary effect of civil liability would be the provision of a significant deterrent against the giving of false testimony in the future. As Justice White stated in his concurring opinion in *Imbler v. Pachtman*:

> It should hardly need stating that, ordinarly, liability and damages for unconstitutional or otherwise illegal conduct has the very desirable effet of deterring such conduct. Indeed, this was precisely the proposition upon which §1983 was enacted. (424 U.S. at 442).

The giving of perjurious testimony by a state official should be condemned. Such action is in complete conflict with the concepts of justice and fair play inherent in the American judicial system. As this Court stated in *Owen, supra*:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights that it has transgressed. (445 U.S. 622 (1980) at 651).

A matter of great significance to a holding by this Court that respondents are not absolutely immune from civil damage actions would be the affirmation given by this Court to important constitutional rights. This was an important, central theme in this Court's recent decision in *Butz v.*

Economou. The Court pointed out that the extension of absolute immunity from damages liability to government officials tends to erode the protection provided by basic constitutional guarantess. 438 U.S. at 505. The Court considered an action for damages against the responsible official as being important to the vindication of constitutional guarantees. 438 U.S. at 506. The Court there harkened to a former decision in emphasizing this point:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee,* 106 U.S. at 220. (438 U.S. at 506).

There is a great potential for symbolic significance in this Court's ruling in this case. A commentator has noted that the public's perception of the Court's rulings in certain areas oftentimes misinterprets the actual import of one of this Court's rulings. *See*, Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980) at 35-36.

The Chief Justice averted to this problem in his concurring opinion in *Bivens* where he stated:

> In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the supression doctrine cases. (403 U.S. at 420-21).

There is no doubt that whatever decision the Court reaches in this matter will spring from a well-considered analysis of the competing interests relating to this issue. However, the symbolic significance of a ruling in respondents' favor—"however erroneous"—could be that police officers could be less than scrupulous in their veracity while they are testifying in state criminal prosecutions and never face significant consequences for it.

A few concluding remarks with respect to the decision of the court of appeals below are in order.

The court of appeals was concerned that a ruling reversing the district courts in this matter would result in the proliferation of baseless complaints that lay witnesses had conspired with state officials when they lied at state criminal trials. Thus, the court was concerned that such a ruling would dissuade potential complaining witnesses from pressing criminal charges. 663 F.2d at 720. However, the court's concern was misplaced. This fact is best highlighted by this Court's decision in *Dennis v. Sparks,* 449 U.S. 24 (1980). In *Dennis*, private parties who were alleged to have conspired with a state judge, through bribery, to deny the plaintiff a fair hearing in state court, argued that they were entitled to absolute immunity because the complaint alleged that they had conspired with the state court judge, who was absolutely immune. Therefore, they argued, they should, similarly, be accorded absolute immunity in order to maintain the integrity of the judicial process. This Court disagreed and held that the defendants were not so immune. The significance of the decision in *Dennis* is immediately apparent in the context of the court of appeals' concern. If this Court reaffirms the common law absolute witness immunity, insofar as it pertains to lay witnesses, the court of appeals' concern will be eliminated. Just as the decision in *Dennis* does not deprive

judges of absolute immunity, a decision by this Court in favor of petitioners will not deprive lay witnesses of absolute immunity. *See also, Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982) at 669.

This Court, in the context of discussing the issue of prosecutorial immunity in *Imbler*, also asserted that the normal protections of the judicial process may be sufficient to protect the rights of victims of constitutional violations perpetrated at a state court criminal trial. Petitioners would assert that, in the case of a perjurious police officer witness, this simply is not the case. Judges, to a certain extent, may be immune from political pressure and jurors may be screened for bias. Nonetheless, cross-examination cannot be seen as the universal panacea for a clever but devious witness. It is important to note that, in a criminal case, vehicles of discovery are not as well developed as in modern civil litigation. Consequently, there is great potential for a party's being caught "flat-footed" at a criminal trial when a witness, particularly a police officer, suddenly gives a version of events that is directly contradictory to an accurate version. Many times there is little or no time to recover from the reeling effects of damaging testimony, whether the testimony is true or not. It is easy to conceive of a situation where a skillful witness can commit perjury and not be hurt in the least by cross-examination. Indeed, in the cases at bar, there is concrete evidence tending to prove that respondents lied during the course of their testimony at petitioners' trials and, in the case of Briscoe, during two probable cause hearings. Nonetheless, petitioners were all found guilty. Briscoe spent approximately three years in custody before a reviewing court finally determined that there was insufficient evidence to convict him beyond a reasonable doubt. Notwithstanding the fact that there is abundant evidence that respondent

Hunley lied during the course of Vickers' and Ballards' trial, Vickers and Ballard are still behind bars and may be for the rest of their lives. To these men, the right of cross-examination was not sufficient to vindicate their rights.

The potential for correctability on appeal is not a sufficient answer to the problem. The injustice inherent in Briscoe's conviction was rectified, in part, by the reversal of his conviction. However, the burden of spending three years in custody before this rectification has not been remedied. The appellate process has afforded no remedy at all to Vickers and Ballard.

Petitioners would also assert that the Court below placed far too great an emphasis upon the utterances of this Court in *Butz v. Economou* related to witnesses. The language in *Butz* that the court below found "dispositive" (663 F.2d at 720-21) was not truely dispositive of this issue. Simiarly, the remarks made by Justice White in his concurring opinion in *Imbler v. Pachtman* are not dispositive. These remarks were directed towards policy considerations relating to witnesses in a general sense. No differentiation was made between a lay witness and a governmental official witness. A ruling by the Court in this case would not do violence to the spirit of the Court's remarks in *Imbler* and *Butz*. This Court can find for the petitioners and still reaffirm the common law witness immunity insofar as it relates to lay witnesses. When a discrete analysis is made with respect to the differences between lay witnesses and polcie officer witnesses, the balancing of interests leads to the logical conclusion that there should be a differentiation between the nature of witnesses, insofar as the imposition of liability is concerned, and a finding that absolute witness immunity does not have to be abolished wholesale. Rather, this Court can simply refuse to extend it to the constitutional tort context.

In concluding, petitioners would refer this Court to the simple but ever-cogent exhortation made by Chief Justice Marshall in *Madbury v. Madison:*

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. (5 U.S. (1 Cranch) 137, 163 (1803).

CONCLUSION

The judgment of the court of appeals should be reversed and this matter should be remanded for further consideration in light of an opinion that there is only a qualified good-faith immunity for police officers alleged to have perjured themselves in state court criminal proceedings.

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLISLE W. BRISCOE,
Petitioner,

v.

MARTIN LAHUE,
Respondent.

CHRIS P. VICKERS, SR.
AND JAMES N. BALLARD,
Petitioners,

v.

JAMES W. HUNLEY, individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a police officer is entitled to absolute civil immunity from liability pursuant to 42 U.S.C. §1983, for his testimony during a criminal trial.

In addition to the parties listed in the caption of the case in this Court, the judgment issued by the United States Court of Appeals for the Seventh Circuit pertained to a third consolidated case, *Talley v. Crosson, et al.* A petition for writ of certiorai has been filed in *Talley*, No. 81-6404.

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1 B. Schwartz, *Statutory History of the United States: Civil Rights* (1970) 36

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, entering judgment in favor of Respondents, is reported at 663 F.2d 713 (7th Cir. 1981). The unpublished memoranda opinions and orders entered by the United States District Court for the Northern District of Indiana, South Bend Division, and The United States District Court for the Northern District of Indiana, Hammond Division, respectively are found in the appendix to the Petition For A Writ Of Certiorari in this case at pp. A-46, A-55, and A-67.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1981. The Petition for a Writ of Certiorari was filed on January 25, 1982, and granted on March 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved in this case are the Fifth, Sixth, and the Fourteenth Amendments to the Constitution of the United States. The statute involved is 42 U.S.C. §1983. Those constitutional provisions and statute are set forth at pages 3-6 of the Petition for a Writ of Certiorari.

STATEMENT

BRISCOE V. LAHUE

On July 6, 1978, Petitioner Carlise W. Briscoe (hereinafter Briscoe) filed a *pro se* complaint, charging

Sgt. Martin LaHue (hereinafter LaHue) with a violation of 42 U.S.C. §1983 (hereinafter "§1983"), in the United States District Court for the Northern District of Indiana, South Bend Division. Briscoe alleged that LaHue violated his right to due process, guaranteed by the fourteenth amendment to the United States Constitution, by, "knowingly and willfully submitt[ing] before the jury on or about March 23, 1977 false testimony and evidence concerning a false three (3) point fingerprint knowing that this print was refuted by the F.B.I. crime lab, as of no value concerning the print of the plaintiff." (J.A. 4-6)[1]

On August 16, 1978, Briscoe filed a Memorandum in Support of Complaint (J.A. 8-16), setting forth the details of his complaint. Although Briscoe's complaint only mentioned LaHue's testimony at Briscoe's criminal trial, Briscoe's Memorandum attempted to delineate LaHue's testimony at Briscoe's two probable cause hearings as well.

LaHue, a police officer employed by the Bloomington, Indiana Police Department, was called as a witness to testify at Briscoe's first probable cause hearing on September 28, 1976. At this hearing, the following direct examination of LaHue, by prosecutor Barry Brown, transpired.

BROWN: And while at the scene, did you conduct an investigation?

LAHUE: Yes we did...I took the piece of glass back to the department and raised the fingerprint, photographed the latent fingerprint, and also checked the fingerprint card of Carlisle Briscoe, and found that it was a section of the right thumb of Carlisle Briscoe.

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[1] "J.A." refers to the Joint Appendix in this case. References to Opinions reproduced in Petition for a Writ of Certiorari and not reproduced in the Joint Appendix will be noted by the designation "A".

LAHUE: It's my opinion that this is the same section that exists on the right thumb of Carlisle Briscoe; also Technician George Abbotts of the Indiana State Police said it's the same.

(J.A. 18).

On November 2, 1976, thus subsequent to Briscoe's first probable cause hearing, yet prior to the second probable cause hearing and criminal trial, LaHue received a letter from the Latent Fingerprint Section of the Identification Division of the Federal Bureau of Investigation (hereinafter "FBI"), stating "no latent prints of value are present on the lift" in question. (J.A. 37).

A second probable cause hearing was conducted on November 17, 1976. LaHue was again summoned to testify, and subjected to direct examination by prosecutor Barry Brown.

BROWN: Were there any miscellaneous physical evidence seized at the scene?

LAHUE: Yes; Sergeant Kuster of the State Police, handed me a piece of glass that had a partial latent fingerprint; I took the glass to the police department and dusted it and removed a latent print from the glass. Shortly after removing it from the glass, I compared it with the known prints of Carlisle Briscoe, that we have at the Police Department, and found that the—a section—the latent print, which is a section of a rolled impression, was identical to a section in the upper right area of Carlisle Briscoe's rolled print, which we have on file.

BROWN: Now, did you attempt to have the same print examined by both the Federal Bureau of Investigation and the Indiana State Police?

LAHUE: Yes, I did.

BROWN: What was their response?

LAHUE: The Federal Bureau of Investigation returned it and stated that there was insufficient points on the latent for them—you know—to make a comparison on.

BROWN: So they didn't even attempt a comparison?

LAHUE: No.

BROWN: Did the State Police?

LAHUE: No; the State Police was likewise; the State Police likes to have something like eleven points, I believe, and I imagine that the F.B.I. is basically about the same.

(J.A. 22).

Finally, LaHue was examined by prosecutor Barry Brown at Briscoe's criminal trial.

BROWN: Now, Sgt. LaHue, with regard to State's Exhibit 42 which is the photograph of the print lifted from the doorway of the piece of glass at the trailer court, that is not a complete fingerprint as you think of a fingerprint.

LAHUE: No sir, it is not.

BROWN: Is this a finger or thumb print of Mr. Briscoe's known print?

LAHUE: This is the right thumb print of Mr. Briscoe.

BROWN: And your testimony is that this is a section of that that you've lifted off of that piece of glass; correct?

LAHUE: Yes. What I'm testifying is that these characteristics in this section here that are visible in the latent print are identical to this section here of Carlisle Briscoe's right thumb print.

BROWN: I'm going to ask you to take this red marking pen and if you'll disfigure your photograph for me, roughly circle the area that's represented

on the known print by what you've been able to lift off of the other print.

LAHUE: I see.

BROWN: Your doctor is going to shoot me. It's roughly this area right in here?

LAHUE: Yes sir. That's true.

BROWN: Thank you. If you'll have a seat please. Sgt. LaHue, in order to be fair on the record, did you submit this fingerprint to be examined by another agency or any other agencies?

LAHUE: Yes, sir. Yes.

BROWN: And to which agency or agencies did you submit it?

LAHUE: I submitted it to the FBI and also the Indiana State Police.

BROWN: What is their policy as far as identifying fingerprints for other agencies other than their own, as you understand it?

LAHUE: All right, sir. I really don't known what the FBI requirements are or their policy is, but I do know that the State Police on a latent print will require eleven point characteristics on a latent print before they would process it.

BROWN: Did they process your print at all?

LAHUE: No, sir; they did not.

BROWN: Did they even examine it?

LAHUE: They visually looked at the latent and stated that they didn't feel there was enough points; of course, they require eleven.

BROWN: This was the Indiana State Police?

LAHUE: Yes, sir.

BROWN: Now, did the FBI want to get involved in this print as far as...

LAHUE: No, in their return they indicated that there wasn't enough points in the latent also.

BROWN: Now did either of these agencies tell you that that section was not, this section right here, did not come from a known point of Carlisle Briscoe?

LAHUE: No, sir, they did not.

BROWN: They never got to that stage?

LAHUE: No, sir that's true.

BROWN: What is the sum and essence of your testimony today, Sgt. LaHue?

LAHUE: Well, the sum and essence of it would be that the probability, even though it does have only three points, the probability of that being anyone else in Bloomington there probably wouldn't be over fifty to one hundred people who may have that same characteristics.

(J.A. 32-34).[2]

On August 23, 1978, counsel for LaHue filed a Motion to Dismiss and Motion for Summary Judgment, and Memorandum in Support Thereof (J.A. 58-64). LaHue alleged that (1) LaHue did not act under color of state law, as required by 42 U.S.C. §1983, when he testified at Briscoe's criminal trial; (2) Briscoe's right to due process would not be violated even if LaHue had perjured himself at Briscoe's criminal trial, because due process is only violated when the prosecutor knowingly

[2]As a result of the criminal trial mentioned above, Briscoe was found guilty of the offenses of first-degree burglary, conspiracy to commit first-degree burglary and assault. Briscoe appealed the criminal conviction. On May 2, 1979, the Court of Appeals of Indiana reversed the conviction. *Briscoe v. State of Indiana*, 338 N.E.2d 638 (Ind. App. 1979). The Indiana Court found that there was insufficient evidence to convict Briscoe for the above named offenses.

introduces perjured testimony; (3) the complaint was defective, because it contained only broad and conclusory statements, unsupported by factual allegations; and (4) LaHue did not perjure himself.

A Memorandum and Order of the District Court, entered on October 3, 1978, (A. 46-54), granted LaHue's motion for summary judgment, and dismissed the complaint. The district court found that (1) LaHue did not perjure himself; (2) Briscoe's complaint was defective; (3) an allegation of perjury *per se* is not sufficient to maintain an action pursuant to 42 U.S.C. §1983; and (4) LaHue did not act under color of state law when testifying. The district court ordered that summary judgment be entered for LaHue, that Briscoe take nothing by his complaint, and that the action be dismissed on the merits. The district court entered Judgment for LaHue on October 5, 1978 (A. 76-77).

On October 18, 1978, Briscoe filed a Notice of Appeal, appealing the decision of the District Court to the United States Court of Appeals for the Seventh Circuit (J.A. 65). The Court of Appeals, *sua sponte*, appointed counsel to represent Briscoe. The issues were briefed, and argument heard on January 20, 1981. On October 27, 1981, the Court of Appeals issued its written decision, affirming the decision of the district court (A. 1-45). The Court of Appeals specifically held that LaHue, as a witness, was absolutely immune from §1983 liability.

VICKERS AND BALLARD v. HUNLEY

On March 5, 1979, Petitioners Chris P. Vickers, Sr. and James N. Ballard (hereinafter Vickers and Ballard) filed a *pro se* complaint, charging Sgt. James W. Hunley (hereinafter Hunley) with a violation of their civil and

constitutional rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution (J.A. 66-69). Vickers and Ballard alleged that Hunley, a police officer employed by the Cedar Lake, Indiana Police Department, presented perjurious testimony during Vickers and Ballard's criminal trials. Vickers and Ballard filed a Response to Defendant's Motion to Dismiss, in which they specifically claimed that exculpatory testimony offered by Hunley during their criminal trial, regarding the time that Vickers and Ballard made statements to the police, and whether Vickers had signed his statement in Hunley's presence, was perjured (J.A. 117-123). Vickers and Ballard charged that Hunley's alleged perjured testimony harmed them, because it allowed the prosecutor to claim that Vickers and Ballard had given their statements contemporaneously (J.A. 120).[3]

Hunley filed a Motion to Dismiss on November 23, 1979, stating that Vickers and Ballard had failed to state a claim for relief, because Hunley, as a witness, was entitled to absolute immunity from §1983 liability (J.A. 114-116).

The case was referred to a magistrate for trial (J.A. 126). On February 13, 1980, the United States Magistrate entered an order dismissing the complaint (A. 55-66). The dismissal was based upon the magistrate's determination that (1) Hunley did not act under color of law when testifying; (2) Hunley, as a witness, was entitled to absolute immunity from §1983 liability; and (3) the due process violation had not been properly alleged, because Vickers and Ballard had not claimed that the prosecution knew that the testimony was perjured.

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[3]Neither Vickers nor Ballard testified at the criminal trial, which resulted in their conviction (J.A. 121).

Vickers and Ballard appealed the magistrate's decision to the district court (J.A. 127). The district court affirmed the finding that Hunley was not acting under color of law while testifying, and that he was absolutely immune from civil liability, as a witness (A. 67-72).

Vickers and Ballard appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit (J.A. 128). The Court of Appeals consolidated Vickers and Ballard's case with *Briscoe v. LaHue* for briefing, argument and decision. In addition, the court, *sua sponte*, appointed counsel to represent Vickers and Ballard. The Court of Appeals affirmed the decision of the district court, holding that Hunley, as a witness, was absolutely immune from liability pursuant to §1983, for his testimony.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Seventh Circuit, in *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981), granted police officers LaHue and Hunley absolute immunity from liability pursuant to 42 U.S.C. §1983, for their testimony during Petitioners Briscoe, Vickers and Ballard's criminal trials. The Petitioners have asked that this court reverse the Seventh Circuit's decision, and rule that LaHue and Hunley are entitled to only a qualified immunity for their testimony. Petitioners argue that all witnesses, except police officers should be granted absolute civil immunity for their in court averments. This Court is thus being asked to forge a special exception to one of the cornerstones of American law: the rule of absolute civil immunity for all witnesses.

The statutory language of 42 U.S.C. §1983 provides a

remedy when "every person" acts under color of law, to deprive another of rights secured by the Constitution and laws. However, this Court has long held that "immunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of §1983." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (citation omitted). This Court has therefore granted prosecutors, judges, legislators and individuals performing adjudicatory functions in federal agencies absolute immunity from §1983 liability, because these immunities were found at common law, and because public policy compelled the continuation of absolute immunity in the §1983 context. *See, e.g. Imbler, supra; Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951); and *Butz v. Economou*, 438 US. 478 (1978).

Similarly, all witnesses were granted absolute civil immunity at common law. For example, in 1772, Lord Mansfield stated the proposition that, "neither party, witness, counsel, jury or Judge can be put to answer, civilly or criminally, for words spoken in office." *The King v. Skinner*, 98 Eng. Rep. 529 (K.B. 1772). The concept of absolute witness immunity from civil liability was repeated by the English courts, and incorporated into American common law.

The policy considerations for granting all witnesses absolute civil immunity are as compelling to modern American courts as they were to the early English courts. For example, absolute immunity is necessary to assure that witnesses "can perform their...functions without harassment or intimidation." *Butz, supra* at 512. In addition, absolute civil immunity is required, in order to protect witnesses from vexatious and repetitive litigation. Further, lack of a civil remedy does not leave

the public without adequate means to deter witness misconduct, because witnesses are subject to the rigors of cross examination, and are subject to criminal penalties for perjury.

Petitioners have asked this Court to distinguish police officer witnesses from all other witnesses, and to grant police officers only a qualified immunity when they testify. However, this argument ignores the functional analysis that this Court has consistently applied in its immunity decisions. Police officers, when functioning as witnesses, are entitled to absolute civil immunity, because they are treated the same as all other witnesses. For example, police officers, like all other witnesses, testify when they are ordered to testify. Similarly, police officers, like lay witnesses, may be intimidated and harassed by the fear of future vexatious litigation, filed by disgruntled criminal defendants. In addition, if police officers, who are experts in the area of police practices, are denied absolute witness immunity, the logical extension of this theory would be to deny other experts, such as physicians and psychologists, absolute witness immunity.

In addition, witnesses are entitled to absolute immunity from §1983 liability because they are an "integral part of the judicial process." *Imbler, supra* at 416. This Court has long held that all participants in the judicial process are entitled to absolute civil immunity, in order to insure the integrity of the judicial branch of government.

Finally, Petitioners' reliance upon this Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967) is misplaced. Petitioners argue that pursuant to the Court's decision in *Pierson*, police officers are entitled to only a qualified immunity when they testify. However, because police

officers do not testify under color of law, this Court's decision in *Pierson v. Ray* is inapplicable to police officers when they testify.

Respondents Sgt. LaHue and Sgt. Hunley respectfully request that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit, and rule that all witnesses, including police officers, are absolutely immune from liability pursuant to 42 U.S.C. §1983.

ARGUMENT

I

POLICE OFFICERS ARE ENTITLED TO ABSOLUTE IMMUNITY FROM LIABILITY PURSUANT TO 42 U.S.C. §1983 FOR THEIR TESTIMONY DURING A CRIMINAL TRIAL

The Civil Rights Act of 1871, 42 U.S.C. §1983 (hereinafter "§1983")[4], provides a remedy to individuals deprived of rights guaranteed by the Constitution and laws, by "every person" acting under color of state law. However, as this Court stated in *Imbler v. Pachtman*, 424 U.S. 409 (1976), "[t]he statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads. But that view has not prevailed." *Id.* at 417.

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[4]42 U.S.C. §1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court has continued to recognize the doctrine of immunity from liability in §1983 actions, for certain individuals, performing specified functions. The Court has noted that by enacting §1983, Congress did not intend to abolish immunity from liability, as developed at common law. As this Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. In *Imbler*, the Court similarly concluded that "§1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." 424 U.S. at 418.

Recently, in *Nixon v. Fitzgerald*, 42 S. Ct. Bull. (CCH) B3665 (1982), Justice Powell, speaking for the majority, explained the Court's approach to an immunity question.

> Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law....This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government.

Id. at B3682 (citations and footnote omitted). Similarly, in *Imbler* this Court stated, "imunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of §1983." 424 U.S. at 418, quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

The instant matter raises the question whether all witnesses, including police officers, are entitled to absolute immunity from §1983 liability. As will be demonstrated, *infra*, witnesses have a common law

tradition of absolute civil immunity. In addition, compelling public policy arguments, which are outlined below, necessitate that all witnesses be guaranteed absolute immunity from §1983 liability. Finally, an examination of the defendant's function, rather than title, as discussed, *infra*, requires that police officer witnesses be granted the same absolute civil immunity that is granted to all other witnesses. Therefore, it is essential that this Court declare all witnesses, including police officers when acting as witnesses, absolutely immune from liability under §1983 because witnesses have a common law tradition of immunity "well grounded in history and reason," and because public policy so requires.

A. This Court has Granted Absolute Immunity from §1983 Liability, When the Immunity Was Found at Common Law, and Public Policy was Best Served.

The Court has been asked to address the question of an individual's entitlement to absolute immunity from §1983 on several occasions. Consistently, the Court has applied a two part test in reaching its decision. First, the Court has examined the common law history of the claimed absolute immunity. Second, the Court has balanced competing policy considerations, in order to determine whether public policy, and the inherent or structural assumptions of our scheme of government, are still best served by continuing this grant of immunity under §1983. A review of relevant case law reveals a consistent and well reasoned application of this two part test.

For example, in *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court was asked whether legislators are

entitled to absolute immunity from §1983, for actions taken in their official capacity. The Court examined the rationale and history of common law legislative immunity.

> [T]o enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one...to whom the exercise of that liberty may occasion offense....These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.

Id. at 373-374. In concluding that legislators are entitled to absolute §1983 immunity, the Court declared, "[w]e cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of §1983] before us." 341 U.S. at 376.

In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court granted judges absolute immunity from §1983 liability. The Court reviewed the history of judicial immunity. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction...." 386 U.S. at 553-554 (citing *Bradley v. Fisher*, 13 Wall. 335 (1871)[5]). Noting that the legislative

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[5]In *Bradley*, the Court granted judges absolute immunity from civil liability for their judicial acts, even when such acts are allegedly performed maliciously.

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon

(Footnote continued on following page)

record is devoid of an intention to abolish all common law immunities, the Court reasoned, "[t]he immunity of judges for acts within the judicial role is...well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson*, 386 U.S. at 554-555 (citation omitted).

The Court addressed the question of absolute prosecutorial immunity in *Imbler v. Pachtman*, 424 U.S. 409 (1976). The *Imbler* Court noted that §1983 immunity is "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421. The Court noted that historically, prosecutors had been entitled to absolute immunity from suit for malicious prosecution. The Court also noted with approval that other courts held prosecutors immune from §1983, as a form of "quasi-judicial immunity," referring to it as a derivative of the immunity of judges recognized in *Pierson, supra*. Policy considerations, the Court found, dictate an absolute immunity for prosecutors, when

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his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful...[I]t would establish the weakness of judicial authority in a degrading responsibility.

13 Wall. at 347 (citation omitted).

The Court further reasoned,

[i]f civil actions could be maintained in such cases [involving pecuniary and liberty interests] against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away.

13 Wall. at 348.

acting as advocates for the government. "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution." 424 U.S. at 424. "The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." 424 U.S. at 426. The *Imbler* Court concluded that prosecutors must therefore be entitled to "the same absolute immunity under Section 1983 that the prosecutor enjoys at common law." 424 U.S. at 427. In addition, the Court noted that the possibility of criminal prosecution for the willful deprivation of constitutional rights, pursuant to 18 U.S.C. §242, had not been altered. 424 U.S. at 427-429.

Recently, in *Butz v. Economou*, 438 U.S. 478 (1978),[6] the Court held that, "persons...performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts." 438 U.S. at 514. The Court reasoned,

> The cluster of immunities protecting the various participants in judge supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall., at 348-49, controversies sufficiently intense to erupt in litigation are not easily capped by judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray, supra*, 386 U.S., at 554. Absolute immunity is thus necessary to assure that judges,

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[6]Because the *Butz* case involved federal, and not state defendants, it was brought as a "*Bivens*-type" claim. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

> advocates, and witnesses can perform their respective functions without harassment or intimidation.
>
> At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error.

438 U.S. at 512 (footnote omitted).

This Court's recent comments in *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981), further illustrate the evolving analysis employed in determining who may be entitled to absolute immunity. "Only after careful inquiry into considerations of both history and policy has the Court construed §1983 to incorporate a particular immunity defense." *Id.* at 2755.

As a result of "a careful inquiry into considerations of both history and policy," the Court granted absolute immunity from §1983 liability to legislators (*Tenney, supra*), judges (*Pierson, supra*), prosecutors (*Imbler, supra*), and individuals performing adjudicatory functions in federal agencies (*Butz, supra*), where the common law dictated, and public policy so required.

With respect to the case at bar, this Court must conduct a careful inquiry into considerations of both the history and policy of absolute witness immunity. Respondents Sgt. LaHue and Sgt. Hunley assert that because there is a common law history of absolute immunity, and because public policy so requires, this Court must declare an absolute immunity for all witnesses from §1983 liability.

B. At Common Law, All Witnesses Were Granted Absolute Civil Immunity

The common law action most similar to a civil action against a witness for alleged perjury is an action brought against a witness for slander.[7] The English common law provided absolute immunity from the latter suit to witnesses for their statements made in court. In *The King v. Skinner*, 98 Eng. Rep. 529 (K.B. 1772), Lord Mansfield stated the proposition that, "neither party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office." *Id.* at 530. The common law found that the judicial process and public policy were best served by the granting of such absolute immunity.

> The origin of the rule was the great mischief that would result if witnesses in Courts of justice were not at liberty to speak freely, subject only to the animadversion of the Court....The rule is inflexible that no action will lie for words spoken or written in the course of giving evidence.

Henderson v. Broomhead, 157 Eng. Rep. 964, 968 (Ex.

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[7] "Slander" is defined in *Black's Law Dictionary* (4th ed. 1968) as "[t]he speaking of base and defamatory words tending to prejudice another in his reputation, office, trade, business or means of livelihood."

1859) (citation omitted). The *Henderson* court also noted that "the balance of inconvenience is strong" against a civil action for indemnification. *Id.* at 967. Although some courts required that the alleged slanderous statement be pertinent and relevant, in order to enjoy the absolute privilege, *see, e.g., Hodgson v. Scarlett*, 106 Eng. Rep. 86 (K.B. 1818); *Revis v. Smith*, 139 Eng. Rep. 1314 (C.P. 1856), other courts found this requirement unnecessary. *Munster v. Lamb*, 11 Q.B.D. 588 (C.A. 1883). Even statements offered under oath, which the witness knew were false, were not actionable. *Henderson, supra; Dawkins v. Rokeby*, L.R. 8 Q.B. 255, 265 (1873). The rationale for this absolute immunity from slander actions for in-court statements is that witnesses and parties should be encouraged to come forward and submit their disputes and statements for legal determination, and should not be required to respond to a civil suit as a consequence of their in-court averments. *Cutler v. Dixon*, 76 Eng. Rep. 886 (K.B. 1585); *Anfield v. Feverhill*, 80 Eng. Rep. 113 (K.B. 1614); *Kennedy v. Hilliard*, 10 Ir. R. 195 (C.L. 1859).

The courts also noted that witnesses should not fear future litigation for their statements offered under oath. *Munster v. Lamb, supra.*

> [W]itnesses are protected from actions for what they state in evidence in a court of justice, otherwise everybody in the witness box would speak in fear of litigation, and no man who was called upon to give evidence would be safe from some troublesome action being brought against him.

Dawkins v. Rokeby, 176 Eng. Rep. 800, 812 (C.P. 1866).

Also, some courts noted that absolute witness immunity was necessary in order to avoid "infinite vexation." *Cutler v. Dixon*, 76 Eng. Rep. 886, 888 n. (A) (K.B. 1585). As Judge

Crompton stated in *Henderson v. Broomhead, supra*, "[t]he mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies." 157 Eng. Rep. at 968.

Finally, some courts noted that because perjury was actionable as a criminal offense, there was no benefit or need to permit a civil action. *Damport v. Sympson*, 74 Eng. Rep. 972 (K.B. 1592), *Eyers v. Sedgewicke*, 79 Eng. Rep. 513 (K.B. 1620); *Henderson v. Broomhead, supra.*

Most American courts have adopted the concept of witness immunity, developed at common law. The policy is to encourage witnesses to speak truthfully, by prohibiting any possible civil action to discourage such free and unhampered speech. Of course, the courts noted, criminal penalties for perjury would apply. *See, e.g., Chambliss v. Blau*, 127 Ala. 86, 28 So. 602 (1899); *Sebree v. Thompson*, 126 Ky. 223, 103 S.W. 374 (1907).

Most American courts that have considered the issue of witness immunity have tempered the English "absolute" rule by requiring that the testimony in question be relevant and pertinent to the court's inquiry (or, at least that the witness, in good faith, believe that his statements are relevant and pertinent). However, the basic concept of witness immunity, and the policy behind it, remain unaltered. *See, e.g. Barnes v. McCrate*, 32 Me. 442 (1851); *Calkins v. Sumner*, 13 Wis. 215 (1860); *Smith v. Howard*, 28 Iowa 51 (1869); *White v. Carroll*, 42 N.Y. 161 (1870); *Marsh v. Ellsworth*, 50 N.Y. 309 (1872); *Crecelius v. Bierman*, 59 Mo. App. 513 (1894); *Cooley v. Galyon*, 109 Tenn. 1, 70 S.W. 607 (1902); *Laing v. Mitten*, 185 Mass. 233, 70 N.E. 128 (1904); *Hendrix v. Daughtry*, 3 Ga. App. 481, 60 S.E. 206 (1908); *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907); *Weil*

v. Lynds, 105 Kans. 440, 185 P. 51 (1919); *Johnson v. Dover*, 201 Ark. 175, 143 S.W.2d 1112 (1940). Professor Prosser summarized the American tradition of witness immunity.

> [Absolute immunity] has been conferred upon witnesses, whether they testify voluntarily or not, and even though their testimony is by affidavit or deposition. The resulting lack of any really effective civil remedy against perjurers is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say.

W. Prosser, *The Law of Torts*, §114, at 777-778 (4th ed. 1971) (footnotes omitted). The *Restatement (Second) of Torts* stated similarly, "[a] witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding." *Id.* §588 (Tent. Draft No. 20, 1974). Professor Veeder commented upon this absolute immunity. "[E]very consideration of public policy requires that [witnesses] should be as fearless in testifying as the judge and jury are independent in weighing their testimony." Veeder, "Absolute Immunity in Defamation: Judicial Proceedings," 9 *Colum. L. Rev.* 463, 476 (1909).

C. Public Policy Requires that All Witnesses, Including Police Officers, When Acting as Witnesses, be Granted Absolute Immunity from §1983 Liability

All witnesses were granted absolute civil immunity at common law. The policy considerations that persuaded the early English courts to grant all witnesses absolute immunity are as relevant and compelling today as they were in 1772, when Lord Mansfield announced, "neither

party, witness, counsel, jury or Judge can be put to answer, civilly or criminally, for words spoken in office." *The King V. Skinner*, 98 Eng. Rep. 529 (K.B. 1772).

The English and American courts have presented a panoply of reasons to grant all witnesses absolute civil immunity. The primary reason for granting absolute civil immunity to all witnesses is the concern that witnesses will be intimidated, and will not speak freely, if every disgruntled litigant could file a civil action, alleging that a witness had submitted perjured testimony. As Justice White reasoned, in his concurring opinion in *Imbler v. Pachtman*, 424 U.S. 409 (1976)

> For a witness, this means he must be permitted to testify without fear of being sued if his testimony is disbelieved....Of course, witnesses should not be encouraged to testify falsely...However, if the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self censorship becomes too great.

Id. at 439-440. The Court reached a similar conclusion in *Butz v. Economou*, 438 U.S. 478 (1978). "Absolute immunity is...necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Id.* at 512. Thus, this Court has recognized that witnesses will not testify honestly and freely, if an atmosphere of coercion, intimidation and fear of future litigation is felt in the courtroom.

Another policy consideration compelling absolute witness immunity from civil liability is the concern that the courts will become a forum for vexatious and repetitive litigation. In *Butz, supra*, this court noted, "[t]he loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." 438 U.S. at 512 (citation omitted). It would go against the grain

of American jurisprudence to require witnesses to respond to malicious civil actions, merely because an individual was dissatisfied with the witness' testimony. The Seventh Circuit commented,

> There seems some basis to surmise that, were witnesses deprived of immunity for their testimony, baseless complaints alleging that lay witnesses conspired with prosecutors to deprive criminal defendants of a fair trial would proliferate. The prospect of being required to defend against such retaliatory suits by angry former defendants might well dissuade potential complaining witnesses from pressing criminal charges or from testifying with total candor at criminal proceedings.

Briscoe v. LaHue, supra, 663 F.2d at 720.

In addition, it must be noted that adequate safeguards exist to encourage a witness to testify honestly, thereby reducing the need to permit civil actions against witnesses. Witnesses are subject to the rigors of cross examination, and may be impeached. In addition,witnesses are subject to criminal penalties for perjury, and may be prosecuted pursuant to 18 U.S.C. §242, the criminal analog of §1983.

Of course, "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow v. Fitzgerald*, 42 S. Ct. Bull. (CCH) B3737, B3752 (1982). Absolute witness immunity does leave the genuinely wronged person without civil redress. However, the alternative of qualifying a witness' immunity would disserve the broader public interest, and be antagonistic to this inherent aspect of American jurisprudence. This Court made a similar observation in *Imbler v. Pachtman*.

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action

> deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system... We emphasize that the immunity of prosecutors from liability in suits under §1983 does not leave the public powerless to deter misconduct or to punish that which occurs.

424 U.S. at 427-429.

D. The Federal Courts Have Granted all Witnesses, Including Police Officers, When Acting as Witnesses, Absolute Immunity from §1983 Liability

The United States Courts of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have granted witnesses absolute immunity from §1983 liability. These courts have applied the two part test discussed above. First, the courts have examined the common law history of absolute witness immunity, discussed *supra*. Next, these courts have determined that public policy dictates the application of this absolute witness immunity to §1983 liability.

For example, in the case at bar, the United States Court of Appeals for the Seventh Circuit examined English and American common law, noting that "[u]nder the English common law, witnesses have long enjoyed absolute immunity from civil liability arising from their testimony....This rule of absolute witness immunity has been incorporated into American common law...." 663 F.2d at 718 (citations omitted). Next, the Seventh Circuit examined the rationale for absolute witness immunity from civil liability, weighing competing policy arguments. The Court of Appeals struck a balance between these arguments, and determined that public policy is best

served by continuing this grant of absolute immunity under §1983, for two primary reasons. First, the Court of Appeals noted that the fear of retaliatory actions, initiated by angry former defendants, "might well dissuade potential complaining witnesses from pressing criminal charges or from testifying with total candor at criminal proceedings." 663 F.2d at 720. Second, the Court of Appeals found that "[t]he rigors of cross-examination and the penalties of criminal prosecution at both the state and federal levels provide substantial checks against false testimony by witnesses." 663 F.2d at 720 (footnote omitted).

Similarly, the United States Court of Appeals for the Fifth Circuit granted all witnesses, including police officer witnesses, absolute civil immunity from §1983 liability. *Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3840 (U.S. Apr. 4, 1982) (No. 81-1881). In *Charles*, the §1983 plaintiff claimed that a police detective, who testified during the §1983 plaintiff's criminal trial, concealed and falsified evidence, allegedly resulting in the §1983 plaintiff's criminal conviction and incarceration. The Fifth Circuit examined the common law history of absolute witness immunity, and the public policy for continuing the grant of absolute witness immunity from §1983 liability. The appeals court reasoned,

> Without such [absolute] immunity, the witness might gauge each of his statements in terms of the possibility of his own personal liability and, therefore, lack the candor and freedom of expression considered essential to the proper functioning of the judicial process. The resulting lack of any civil remedy against the dishonest witness "is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for they [sic] say." Prosser, [*The Law of Torts*, §114 (4th ed. 1971)] at 778.

Id. at 666 (citation omitted).

In *Brawer v. Horowitz*, 535 F.2d 830 (3rd Cir. 1976), the civil rights plaintiff alleged an unlawful conspiracy to convict him, by means of the witnesses' perjured testimony. In evaluating the defendants' claim of absolute immunity from liability within the purview of the Civil Rights Act, the court stated its method of analysis. "[W]e inquire into the immunity historically accorded witnesses at common law and the interests behind it...then we must determine whether the considerations of public policy underlying the common law rule likewise countenance immunity...." *Id.* at 836 (citation omitted). In holding the witnesses immune the court relied upon 1 F. Harper and F. James, *The Law of Torts*, §5.22 at 424 (1956).

> The function of witnesses is fundamental to the administration of justice. The court's judgment is based on their testimony and they are given every encouragement to make a full disclosure of all pertinent information within their knowledge. They are, of course, subject to the control of the trial judge and are subject to contempt citation for misbehavior in the exercise of the privilege and to prosecution for perjury if convicted of knowingly giving false testimony.

535 F.2d at 837. The court noted that immunity from §1983 liability does not mean that witnesses are free to present perjured testimony, without consequence.

> Immunity from a civil damage suit, however, does not mean that a cooperating witness in a criminal trial can speak with complete impunity of his former cohorts. The trial judge may exclude inflammatory testimony... On cross-examination, counsel may seek to undermine the witness' credibility. Even if it develops only later that the witness committed perjury...the witness may be indicted and convicted of perjury.

Id. (citation omitted). Thus the *Brawer* court found that witnesses historically afforded absolute immunity from

civil liability, are entitled to absolute immunity from §1983. Such immunity, the court found, is necessary in order to insure the "full disclosure of all pertinent information," thus allowing the trier of fact to reach a fair and appropriate decision.

The United States Court of Appeals for the Eighth Circuit reached a similar conclusion in *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979) *cert. denied*, 444 U.S. 901 (1979). In *Myers*, the court held that the police officer-witness was entitled to absolute immunity from liability within the purview of §1983, for his testimony at the §1983 plaintiff's criminal trial.

> [W]e agree that the majority position is correct and that witnesses should be immune from civil rights suits alleging perjurious testimony. In *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d. 128 (1976), the Supreme Court held prosecutors immune from civil rights suits based on acts taken in the course of their duties. In so holding, the Court stressed the need for full disclosure of relevant evidence to the jury and noted that a prosecutor might be reluctant to call witnesses if he would be subject to civil suit based on the allegation that he knew or should have known that they were testifying falsely. *Id.* at 426, 96 S. Ct. 984. A similar rationale would apply to witnesses who might be reluctant to give their version of the case if faced with the possibility of civil suit if their testimony is disbelieved by the trier of fact. In addition, the Court noted that there are already substantial checks on the prosecutor's activity, including prosecution under the criminal analog of §1983, 18 U.S.C. §242. *Id.* at 429, 96 S. Ct. 984. Similarly, witnesses would be liable to criminal prosecution for perjury in most, if not all, jurisdictions. Finally, in a concurring opinion, Justice White, joined by Justices Brennan and Marshall, specifically recognized the witness immunity role in such a way as to indicate that it is co-extensive with the

> immunity of other participants at trial—*i.e.*, judges and prosecutors. *Id.* at 439-40, 96 S. Ct. 984.

Id. at 866.

In addition, in *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963); *Bryant v. Commonwealth of Kentucky*, 490 F.2d 1273 (6th Cir. 1974); *Lofland v. Meyers*, 442 F. Supp. 955 (S.D.N.Y. 1977);[8] and, *Brown v. DeBruhl*, 468 F. Supp. 513 (D.S.C. 1979), federal courts have granted police officers, when acting as witnesses, absolute immunity from §1983 liability. Similarly, in *Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978); *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *Warren v. Applebaum*, 526 F. Supp. 586 (E.D.N.Y. 1981); *Nash v. Reedel*, 86 F.R.D. 12 (E.D. Pa. 1979); *Conley v. Office of the Public Defender*, 653 F.2d 1241 (8th Cir. 1981); *Martens v. Tremble*, 481 F. Supp. 831 (E.D. Wis. 1979); *O'Connor v. State of Nevada*, 507 F. Supp. 546 (D. Nev. 1981), the federal courts have granted government witnesses, such as medical examiners and social workers, absolute immunity from §1983 liability.

In *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) and *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), both cited in Petitioners' brief, the respective courts did not reach the question of absolute witness immunity. In *Moore*, *supra*, the United States Court of Appeals for the Third Circuit specifically declined to determine whether FBI agents, who allegedly falsified a document entered into evidence at plaintiff's criminal trial, were entitled to absolute witness immunity. 457 F.2d at 894. In *Briggs*, *supra*, the defendant, a United States Department of Justice attorney, claimed that he had acted as a witness during a grand jury

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[8] *Lofland* was a *Bivens*-type civil rights claim. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

investigation of plaintiff's activities. Defendant therefore claimed that he was entitled to absolute witness immunity. However, the *Briggs* court would not accept defendant's assertion that he had acted in the capacity of a witness.

> The statement assailed here was prompted by, and directly incidental to, appellant's status as a prosecutor managing and administering an investigation... It is obvious from the transcript that the court did not consider appellant to be an ordinary witness. It ordered him to take the stand; it asked him one question; and it forthwith excused him. Indeed, when appellees' counsel sought leave to cross-examine, the court denied it. The policies underlying the common law doctrine of witness immunity are tangential, and essentially irrelevant, to the question of whether appellant—a prosecutor functioning in an investigative context—should be accorded complete invulnerability to suit for the consequences of an act performed in that capacity.

569 F.2d at 26-27. The *Briggs* court stated that although most American courts had adopted the common law doctrine of absolute immunity (tempered with requirements of relevancy and pertinency), "it can be asserted with both reason and authority that absolute immunity is not to be extended to the constitutional tort context absent the most compelling justification." 569 F.2d at 28.[9]

Respondents do not take exception with the *Briggs* court's rationale. There is no question that only a "compelling justification" can permit a court to grant absolute immunity from §1983. However, in light of the common law history of absolute witness immunity, and the policy considerations discussed, *supra*, there can be no

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[9]The *Briggs* court did not find a "compelling justification" to grant a prosecutor immunity from §1983 liability, when a prosecutor is performing administrative tasks.

question that such a "compelling justification" requires this Court to declare all witnesses absolutely immune from liability within the purview of §1983.

In summary, this Court is urged to grant all witnesses, including police officers, absolute immunity from §1983 liability, because this immunity is "well founded in history and reason," and because public policy so requires.

II

THIS COURT'S DECISION IN *PIERSON V. RAY* IS INAPPLICABLE TO POLICE OFFICERS WHEN THEY TESTIFY DURING A CRIMINAL TRIAL

In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court held that police officers are entitled to a qualified immunity from §1983 liability, in actions for false arrest and imprisonment, where the officer acts in good faith and with probable cause. *Id.* at 557. Petitioners Briscoe, Vickers and Ballard argue that the Court's holding in *Pierson* should be extended to police officers when they testify, thereby entitling police officers to only a qualified immunity from §1983 liability for their testimony. However, Petitioners concede that all other witnesses are entitled to absolute immunity from §1983 liability for their testimony. Brief of Petitioners at 28-34. Petitioners, therefore, are asking this Court to distinguish police officer-witnesses from all other witnesses, solely on account of their profession. This argument is misguided, and must fail for two primary reasons. First, this Court has stated that it will apply a functional analysis, when determining whether an individual is entitled to immunity from §1983 liability. Because police officers function as witnesses when they testify, police officers are entitled to absolute immunity from §1983 liability for their testimony. Second, in order to maintain an action for relief pursuant to §1983, the

defendant must have committed the allegedly unlawful act under color of state law. Because police officers do not testify under color of state law, the statutory requirement cannot be satisfied.

A. Police Officers, When Functioning as Witnesses, Are Entitled to Absolute Immunity From §1983 Liability

It is well settled that this Court will follow a functional approach to immunity questions. *See, e.g., Harlow v. Fitzgerald*, 42 S. Ct. Bull. (CCH) B3737, B3748 (1982). As Justice White explained, "the immunity attaches to particular functions—not to particular offices." *Nixon v. Fitzgerald*, 42 S. Ct. Bull (CCH) B3665, B3700 (1982) (dissenting opinion). Therefore, this Court has stated that it will examine the function, or activity of the §1983 defendant, rather than his official title, when determining whether the defendant is entitled to an absolute or qualified immunity (or, of course, no immunity) from §1983 liability.

For example, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court granted prosecutors absolute immunity from §1983 liability when functioning as advocates for the government, because it was determined that considerations of history and policy required that prosecutors be absolutely immune from civil liability for their advocacy function. However, this immunity does not necessarily extend to a prosecutor's other functions.

> [T]he Court reserved the question whether absolute immunity would extend to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer." Since that time the courts of appeals generally have ruled prosecutors do not enjoy absolute immunity for acts taken in those capacities.

Harlow, supra at B3749, n. 16 (citations omitted).

Similarly, a police officer, when functioning in his capacity as a person charged with making arrests, is entitled to a qualified immunity. In the same vein, a police officer, when functioning as a witness, is entitled to the same immunity accorded all other witnesses, because when a police officer testifies, he is treated like any other witness. For instance, like any other witness, the police officer is called to testify; he is administered an oath; he is subject to cross examination; he may be impeached; and, he may be prosecuted for perjury. The police officer, like other eye witnesses, testifies about what he saw or heard. And, like other expert witnesses, the police officer testifies about his expertise, in areas such as fingerprints or weapons. The police officer is not afforded differential or special treatment, once he assumes the witness stand.

Petitioners present a variety of reasons to justify their argument that police officer witnesses should be granted a lesser form of immunity than all other witnesses. For example, Petitioners state, "[t]he normal lay witness has no duty to testify." Brief of Petitioners at 28. However, the "normal" lay witness will testify only if a subpoena is issued. Of course, receipt of a subpoena requires the witness to appear in court.

> A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and *shall command* each person to whom it is directed to attend and give testimony at the time and place specified within.

Fed. R. Crim. P. 17(a) and *Fed. R. Civ. P.* 45(a) (emphasis added). Disobedience or disregard of a subpoena is punishable by criminal contempt proceedings, pursuant to 18 U.S.C. §401. Compulsory attendance and testimony statutes, enforced by contempt proceedings, are standard operating procedure in state courts as well. *See, e.g.*, Ind. Code §35-1-31-1 (Burns 1981). In addition, a criminal

defendant has a constitutional right to compulsory service of process of needed witnesses, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. *See, also, Fed. R. Crim. P.* 17(b). Therefore, Petitioners create an artificial distinction, by arguing that "normal" witnesses testify voluntarily, whereas police officer witnesses testify involuntarily. Thus, the concept that absolute immunity is a just reward to the voluntary "normal" witness falls short.

In addition, Petitioners allege that the trier of fact is more likely to be misled by a dishonest police officer, than by any other witness. Brief of Petitioners at 30. Initially, it must be noted that this argument assumes a level of bad faith that does not exist. The overwhelming majority of police officers testify honestly. In addition, this argument ignores the fundamental function of triers of fact. It is precisely the role of judges and juries to weigh the honesty and credibility of witnesses. Further, if we assume, for argument's sake, that the trier of fact will be misled by a police officer, we must also assume that the same trier of fact will be as easily misled by other expert witnesses, such as psychologists, physicians, medical examiners, and architects. These individuals may carry an even greater cloak of authority than a police officer, since they often possess many graduate degrees, are well respected by their colleagues as experts in their profession, and may have been selected by the court to render an opinion and testify. If the court accepts Petitioners' arguments that police officers must be granted only a qualified immunity, because they could easily mislead the trier of fact, then these experts, also, would lose the cloak of absolute witness immunity. Surely, Petitioners' argument raises the question of how courts and lawyers will secure expert testimony, often needed to assist the trier of fact in actions involving complex issues, as varied as medical malpractice, the

sanity of a criminal defendant, or the location of property lines, if experts are not guaranteed absolute civil immunity for their testimony.

In addition, American law has never drawn a distinction between expert, or "high-credibility" witnesses, and other witnesses. *See, e.g.*, W. Prosser, *The Law of Torts*, §114 at 777-778 (4th ed. 1971). In fact, juries are routinely instructed that they are the final judges of the credibility of witnesses, and are free to disregard the expert's opinion entirely. Devitt and Blackmar, *Federal Jury Practice and Instructions*, §15.22 at 484 (3rd ed. 1977). Further, neither a court nor jury is obliged to accept an alleged expert's testimony, even though it be uncontradicted. *See, e.g., County Asphalt, Inc. v. The Lewis Welding and Engineering Corp.*, 444 F.2d 372 (2nd Cir. 1971). Therefore, Petitioners' argument that police officers are more likely to mislead the trier of fact that other witnesses must also fail.

Petitioners also argue that police officers would suffer no economic hardship if they are granted only a qualified immunity, because police officers are often represented by government attorneys, and are often covered by municipal indemnification insurance. Initially, it must be noted that this argument ignores the psychological and emotional toll that this fear of litigation, or involvement in litigation, must take upon the police officer who is already employed in a stressful job. In addition, this argument overlooks the fact that most municipal attorneys are overworked, and do not have the time to dedicate to federal court litigation where the good faith of a witness is in question. Further, most municipalities, during this era of fiscal constraint, cannot afford to hire enough attorneys or purchase enough insurance, to represent or indemnify police officers every time a disgruntled criminal defendant alleges that a police officer presented perjured testimony during a criminal trial.

Petitioners also argue that perjury was a major concern of the 42nd Congress, when it drafted what has been codified as §1983. Therefore, Petitioners argue, police officers accused of perjury in a civil rights action should be granted only a qualified immunity. Ironically, though, the members of Congress were not concerned with perjured testimony offered by police officers. Rather, the members of Congress were concerned with perjured testimony offered by private citizens, who were members of the Ku Klux Klan. *See*, 1 B. Schwartz, *Statutory History of the United States: Civil Rights*, 597-653 (1970). Thus, again, Petitioners' argument that a distinction be drawn between police officer witnesses, and all other witnesses, must fail.

In addition, it must be noted that private parties who are alleged to have conspired with public officials to violate an individual's federal rights can also be liable under §1983. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). Therefore a disgruntled litigant would need only allege that the witness conspired with the police, and the witness would lose his claim to absolute immunity.

As a final note, we call this Court's attention to its own comment in *Pierson v. Ray*, *supra*.

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.

386 U.S. at 555. Similarly, a policeman's lot is not so unhappy that he must choose between being held in contempt, for refusing to testify, and being subject to civil suits for damages, filed by disgruntled criminal defendants, if he does.

In conclusion, the application of a functional analysis compels this Court to grant all witnesses, including police

officers, absolute immunity from §1983 liability for their testimony.

B. Police Officers Do Not Testify Under Color of State Law

In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court specifically addressed the question whether a police officer is entitled to a qualified immunity from §1983 liability, when he perfects an arrest, in good faith and with probable cause. Because police officers are specifically authorized to make arrests, they usually act under color of state law when bringing someone into custody. Therefore, the statutory requirement that the §1983 defendant act under color of state law is satisfied in the arrest context. Because police officers do not testify under color of state law, one of the requisite elements of a §1983 action is not present.

The requirement that the alleged unlawful act be committed under color of state law is indispensable to the establishment of a claim for relief pursuant to §1983. "It is settled beyond cavil that...to present a valid cause of action under the section quoted [§1983], the plaintiff must show that the defendant acted or claimed to act under color of law." *Shemaitis v. Froemke*, 189 F.2d 963 (7th Cir. 1951) (citations omitted). Of course, "[n]ot all acts of a police officer are under color of State law." *Warner v. Croft*, 406 F. Supp. 717, 721 (W.D. Okla. 1975). Because police officers do not testify under color of state law, this Court's decision in *Pierson v. Ray, supra*, is inapplicable to police officers for their testimony during a state court criminal trial.

The meaning of the term "under color of state law" has been addressed by the courts at great length. In 1941, this Court declared that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer

is clothed with the authority of state law, is action taken "under color of state law". *United States v. Classic*, 313 U.S. 299, 326 (1941) (citations omitted).[10]

In order to act under color of state law, therefore, "a person having authority by law must use *such authority* to deprive another of this guaranteed rights." *Edwards v. Vasel*, 349 F. Supp. 164, 166 (E.D. Mo. 1972), *aff'd.*, 469 F.2d 338 (8th Cir. 1972) (emphasis in original). In *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913), the Court provided a test to determine if a state officer is acting by virtue of state power. The Court stated, "the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority." *Id.* at 288-289.

The language in cases such as *Classic, supra, Monroe, supra,* and *Home Telephone and Telegraph Co., supra,* leaves no doubt that this court requires that a "but for" test be applied when determining if specific activities are actionable under §1983. That is, it must be determined whether the alleged unlawful acts could not have been committed but for the cloak of the state's authority. *See, e.g., Spires v. Bottorff*, 317 F.2d 273, 274 (7th Cir. 1963), *on remand*, 223 F. Supp. 441 (S.D. Ind. 1963), *aff'd.*, 332 F.2d 179 (7th Cir. 1964), *cert. denied*, 379 U.S. 938 (1964), *reh. denied*, 379 U.S. 985 (1965).

The federal courts have consistently held that a §1983 action will not lie where the §1983 defendant was not vested

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[10]Although *Classic, supra,* involved the predecessor to 18 U.S.C. §242 (the criminal analog to 42 U.S.C. §1983), the Court concluded "that the meaning given 'under color of' law in the *Classic* case...was the correct one, and we adhere to it." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). *Monroe* is a §1983 case.

with authority, by the state, to perform the alleged unlawful act. For example, in *Potts v. Wright*, 357 F. Supp. 215 (E.D. Pa. 1973), the student-plaintiff was subjected to a strip search by local police, after school officials requested that the police investigate an alleged crime. The *Potts* court hypothesized,

> [i]f school officials have absolutely no authority under state law to search any individual, their searching of students without the aid of the police would be a battery or possibly an invasion of the right of privacy under state law, and would not constitute a civil rights violation.

Id. at 219.

Similarly, in *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968), the district court addressed the question whether a police officer's actions were performed under color of state law. In *Johnson*, the defendant police officer, while on duty, called the §1983 plaintiff a variety of derogatory names, including "nigger," and then challenged the plaintiff to a fight. The court stated,

> The acts complained of here were not under "pretense" of law. They were not committed in the performance of any actual or pretended duty of policemen. They were not acts these defendants could not have committed but for the cloak of the state's authority. It is not alleged that the offer to fight was in any way related to the performance of police duties.

284 F. Supp. at 937. The court concluded,

> What plaintiff's position boils down to is that any act committed by a police officer while on duty and in uniform is under "color of law", even if the act is wholly unrelated to the performance of any of his duties. This contention attempts to equate "clothed with the authority of state law" to "wearing a policeman's uniform." Of course they are not the same. *It is the nature of the act performed, not the clothing of the actor*

> *or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law.* If the police officer was enabled to do what he did because of the authority of his office, even if what he did constituted an abuse of that authority, either by the excessiveness of his conduct or because the act was not actually, although apparently, authorized, the act is under "color of law".

Id. (emphasis added). The *Johnson* court's rationale exemplifies the meaning of "under color of law," as defined by this Court in *Classic*, *supra*, and *Monroe*, *supra*. It is clear that if the state official's acts could not have been committed but for the cloak of official authority, such acts are not taken "under color of law," within the purview of §1983.[11]

The case at bar presents the question whether a police officer's testimony at a criminal trial is offered "under color of state law." The answer to this question, in light of the cases discussed above, must be "no." A majority of courts that have considered the question have also held that a police officer's testimony is not action taken under color of state law, within the meaning of §1983.

Ind. Code §§36-8-3-6, and 36-8-3-10 (Burns 1981), state the duties and powers of police officers. Police officers are specifically charged with the responsibility of, *inter alia*,

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[11]For further discussion of the application of the statutory requirement that the §1983 defendant act under color of state law, *see, e.g., Triplett v. Azordegan*, 570 F.2d 819, 823 (8th Cir. 1978); *Warner v. Croft*, 406 F. Supp. 717, 720 (W.D. Okla. 1975); *Peoples Cab Co. v. Bloom*, 330 F. Supp. 1235, 1240 (W.D. Pa. 1971), *aff'd.*, 472 F.2d 163 (3rd Cir. 1972); *Chicago's Last Department Store v. Indiana Alcoholic Beverage Commission*, 161 F. Supp. 1, 4-5 (N.D. Ind. 1958); *Simmons v. Whitaker*, 252 F.2d 224, 229 (5th Cir. 1958); *Rogers v. Fuller*, 410 F. Supp. 187, 191 (M.D.N.C. 1976); *United States ex rel. Smith v. Heil*, 308 F. Supp 1063, 1065 (E.D. Pa. 1970); and, *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440, 443 (8th Cir. 1950).

serving warrants, making arrests, preserving the peace, conveying prisoners, suppressing riots, preventing crime, and bringing arrested persons to court. The Indiana Code does not authorize or require officers to testify in court or at hearings. Nor is there a requirement that officers must testify at a criminal proceeding in order to secure a conviction, or that private citizens are prohibited from testifying at criminal proceedings. Petitioners have suggested that a police officer's responsibilities include testifying at criminal proceedings, and obtaining convictions. However, Indiana law is clearly devoid of the imposition of such responsibilities. Therefore, it is obvious that a police officer who testifies in court or at a hearing does not do so solely on account on his official authority. As the Eighth Circuit stated in *Triplett v. Azordegan*, 570 F.2d 819 (8th Cir. 1978), "[i]n testifying, the [police] officer was not using his official authority since he was testifying as a witness, and in this respect was no different than any other witness." *Id.* at 823.

The facts in *Edwards v. Vasel*, 469 F.2d 338 (8th Cir. 1972), *aff'g.*, 349 F. Supp. 164 (E.D. Mo. 1972), are almost identical to the instant case. The §1983 plaintiff in *Edwards* alleged that the defendant police officer presented perjured testimony at plaintiff's habeas corpus hearing. Because defendant was a police officer, plaintiff argued that defendant's testimony was offered under color of state law. The court rejected plaintiff's argument.

> [W]e do not believe that a witness who allegedly testifies falsely does so under color of law, as that term is used in the civil rights statute, whether or not the witness is a police officer. At the habeas corpus hearing held before Judge Meredith defendant testified as a *witness*. In this respect he was no different than any other witness. True, the matters concerning which defendant testified related to what

> he had done, heard and observed while performing his duties. However, plaintiff's claim is based not on what defendant *did* while clothed with his official authority but what transpired *thereafter*. In order that conduct be under color of state law there must be a *misuse of power possessed* by defendant by virtue of state law and made possible *only because the wrongdoer was clothed with authority of state law. Monroe v. Pape*, 365 U.S. 167, 184. That is, a person having authority by law must use *such authority* to deprive another of his guaranteed rights. In testifying, defendant was not using his official authority.

349 F. Supp. at 166 (emphasis in original). Thus the Eighth Circuit has concluded[12] that a police officer who testifies, whether at a trial or at a hearing, does not do so under color of state law, because the *Monroe*, *supra*, and *Classic*, *supra*, "but for" test could not be satisfied. *Edwards*, 469 F.2d at 339. The *Edwards* courts realized that the defendant police officer had not testified solely because of his official capacity. The defendant in *Edwards*, as the court observed, testified as a witness, and "[i]n this respect, he was no different than any other witness." *Edwards*, 349 F. Supp. at 166.

In *Smith v. Sinclair*, 424 F. Supp. 1108 (W.D. Okla. 1976), the United States District Court for the Western District of Oklahoma reached the same conclusion as the *Edwards* courts. The plaintiff in *Smith* alleged that defendants (deputy sheriff, chief of police and Oklahoma State Trooper) presented perjurious testimony at his criminal trial. The plaintiff claimed that this alleged perjurious testimony was made "under color of law," and therefore fell within the purview of §1983. The *Smith* court rejected this argument.

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[12]The Eight Circuit specifically approved of the district court's opinion. 469 F.2d 338, 339 (8th Cir. 1972).

> Here allegedly defendants...testified against the plaintiff in both of his criminal trials...In testifying although officers of the State of Oklahoma they did not purport to act pursuant to any State law but in response to the orders of the respective courts which directed them to appear to testify....The fact that the witnesses may have been State officials is not significant as their evidence was presented not under color of their office but as any other witness of facts coming to their attention during the time they held such official positions.

Id. at 1113 (citations omitted).

Similarly, the court in *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979), *cert. denied*, 444 U.S. 901 (1979), held that the defendant police officer did not act under color of state law when he testified at plaintiff's criminal trial and pretrial motion to suppress evidence. The Sixth Circuit, in *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963), employed the same rationale as that articulated in *Edwards, supra*, when it opined, "[n]or do we think that giving a false version of the accident...would bring the case under the Civil Rights Act." *Hurlburt, supra* at 725.

In *Hillard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976) (defendant Clark) *vacated and remanded in part on other grounds*, 424 U.S. 961, (1976), *on remand*, 540 F.2d 220 (6th Cir. 1976), and *Spears v. Conlisk*, 440 F. Supp. 490 (N.D. Ill. 1977), both discussed in Petitioners' brief, police officers were found liable pursuant to §1983 when testifying. These two cases are clearly distinguishable from the instant matter. In both cases, the defendant police officers acted in a conspiracy to obtain plaintiff's criminal conviction, with the use of perjured testimony. In *Hilliard*, the defendant police officer gave perjured testimony at plaintiff's criminal trial, at the direction of the prosecuting attorney.

Similarly, in *Spears*, the defendant police officers gave perjured testimony in conjunction with perjured testimony offered by a physician-witness. In addition, neither the *Hilliard* nor *Spears* courts determined whether police officers, when testifying, act under color of state law. The *Hilliard* court did not address the issue of whether a police officer acts under color of law when testifying. *See, Myers v. Bull*, 599 F.2d 863, 865, n. 5 (8th Cir. 1979), *cert. denied*, 444 U.S. 901 (1979). The *Spears* court determined that the police officers' unjustified use of excessive force, false accusation of charges and perjured testimony at plaintiff's criminal trial constituted action taken under color of law. However, the *Spears* court did not separate these actions, or determine whether each act, reviewed independently, constituted action taken under color of law. There can be no question, for example, that the use of excessive force by a police officer, in attempting to make an arrest, is action taken under color of law. Thus, the *Spears* court might well have reached a different result, had the "testimony" question been presented independently.

The Seventh Circuit did not "definitively address the color of law issue...." presented by the instant matter. *Briscoe, supra*, 663 F.2d at 721, n. 4. However, the Seventh Circuit did state that in certain circumstances, a police officer might testify under color of law. We must respectfully disagree with the Seventh Circuit's assessment. The Eighth Circuit, in *Triplett v. Azordegan*, 570 F.2d 819 (8th Cir. 1978), noted, "[i]t is the nature of the act performed by a state official, not the status of a state official as such, that is determinative of the applicability of 42 U.S.C. §1983." *Id.* at 823 (citations omitted). Because the nature of the act of testifying does not require the officer to act under pretense of authority, courtroom and hearing testimony is not offered by a police officer under color of

law. As this Court stated in *United States v. Classic*, 313 U.S. 299 (1941), "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 326 (citation omitted).

In conclusion, a police officer does not testify because he is cloaked with the authority of state law. The police officer sheds his cloak of authority when he assumes the role of a witness.Therefore, this court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967), is inapplicable to police officers when they act as witnesses, because the statutory requirement that the defendant act under color of state law is not satisfied.

III

ALL WITNESSES, INCLUDING POLICE OFFICERS, ARE ENTITLED TO ABSOLUTE IMMUNITY FROM §1983 LIABILITY AS A BY-PRODUCT OF ABSOLUTE JUDICIAL PROCESS IMMUNITY

This Court has developed the doctrine of judicial process immunity, which guarantees all individuals who play "an integral part of the judicial process" absolute civil immunity. *Imbler v. Pachtman*, 424 U.S. 409, 416 (1976) (citations omitted). All witnesses, including police officers, are entitled to absolute immunity from liability pursuant to §1983, as a natural progression and inclusion in the broader absolute immunity from §1983 liability, guaranteed to participants in the judicial process, because witnesses play an "integral part of the judicial process." The Court may therefore grant witnesses absolute civil immunity from §1983 liability based upon the theory of judicial process immunity, as well as the theory of absolute witness immunity, discussed *supra*.

The roots of judicial process immunity can be found in common law. For example, in *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607), Lord Coke observed, "if the judicial matters of record should be drawn in question...there never will be an end of causes; but controversies will be infinite; *et infinitum in jure reprobatur*.." *Id.* at 1306. Similarly, in *Randall v. Brigham*, 7 Wall. 523 (1868), the Court quoting *Yates v. Lansing*, 5 Johns. 283 (Sup. Ct. 1809) stated, "Whenever... we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public they become contemptible." *Randall*, 7 Wall. at 539. More recently, this Court reached a similar conclusion in *Barr v. Matteo*, 360 U.S. 564 (1959).

> This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed...and that a like immunity extends to other officers of government whose duties are related to the judicial process.

Id. at 569 (citations omitted).

There are two independent reasons for granting participants in the judicial process absolute immunity. First, all participants in the judicial process, whose participation is integrally related to the judicial process, must be granted absolute civil immunity, in order to insure the integrity of the judicial branch of government. Second, the discretionary nature of the work performed by judges, prosecutors, jurors and witnesses must be protected from outside influence and intimidation.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court discussed the two independent reasons for granting

participants in the judicial process absolute immunity, when granting absolute immunity from §1983 liability to prosecutors. As is discussed, *supra*, the Court relied upon the history of absolute prosecutorial immunity and compelling policy considerations, in granting prosecutors absolute immunity from §1983 liability. In addition, the Court recognized prosecutorial immunity as a necessary by-product of judicial immunity, because prosecutorial activities "can only be characterized as an 'integral part of the judicial process.'" 424 U.S. at 416 (citations omitted). The *Imbler* Court noted that prosecutorial immunity is often referred to as a form of "quasi-judicial" immunity, derivative of the immunity of judges recognized in *Pierson, supra*. The *Imbler* Court noted that the prosecutor must exercise discretion in determining when to initiate and prosecute an action. The Court then noted that absolute immunity from §1983 liability is necessary in order to protect the decision making process from influence and intimidation.

Absolute judicial process immunity has been granted to witnesses, jurors, public defenders and probation officers, when it was determined that their acts are intimately related to the judicial process. For example, in *McIntosh v. Garofalo*, 367 F. Supp. 501 (W.D. Pa. 1973), the §1983 and §1985 plaintiff alleged that a doctor and a juror had conspired to deprive plaintiff of a favorable verdict in the plaintiff's malpractice suit against the doctor. The federal district court found the juror absolutely immune from §1983 liability, because of judicial process immunity.

> [T]he integrity of the judicial process demands that jurors, as well as judges...and prosecutors...be free to discharge their duties without fear of subsequent harassment. To hold that a juror in a civil case is not immune from liability under §1983 would be to subject each citizen/juror, men and women who serve their

> community in a spirit of well-meaning, if sometimes grudging, civil altruism, to the possibility of lengthy, expensive and burdensome combat against the vendettas of dissatisfied litigants. Such a state of affairs cannot be fostered. A juror in a civil action is immune from subsequent suit for damages under 42 U.S.C. §1983.

Id. at 504 (citations and footnote omitted).

Similarly, in a *per curiam* decision, the United States Court of Appeals for the Ninth Circuit granted a probation officer and a court-appointed psychiatrist absolute immunity from §1983 liability. *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970). The Ninth Circuit reasoned,

> A probation office preparing and submitting a probation report in a criminal case is performing a 'quasi-judicial' function and is entitled to a similar, if not the same, immunity that is accorded to judges for acts done by them in the exercise of their judicial functions.
>
> The function of the examining psychiatrists in this case falls within the scope of 'quasi-judicial immunity' defined by this court in *Robichaud v. Ronan*, 351 F.2d 533, 536 (9th Cir. 1965), to extend to acts committed 'in the performance of an integral part of the judicial process.'

Id. at 319 (citations omitted).

A public defender was also granted absolute judicial process immunity from §1983 liability because "the alleged Sixth Amendment violation, a broken plea bargain, is integrally related to the judicial process." *Miller v. Barilla*, 549 F.2d 648, 649 (9th Cir. 1977). *Accord, Brown v. Joseph*, 463 F.2d 1046 (3rd Cir. 1972); *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976).

Witnesses, including police officer witnesses, have been granted absolute judicial process immunity from §1983

liability because they are indispensable participants in the judicial process.

> The witness' immunity—like the immunity accorded to judges and prosecutors—was based upon his status as an essential participant in the judicial process....
>
> Because the witness plays such an integral role in the fact-finding process, the reluctant or reticent witness would disserve the ends of justice regardless of the nature of the proceeding.

Charles v. Wade, 665 F.2d 661, 666 (5th Cir. 1982). *Accord*, *Brawer v. Horowitz*, 535 F.2d 830 (3rd Cir. 1976); *Brown v. DeBruhl*, 468 F. Supp. 513 (D.S.C. 1979). In *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979), the Fourth Circuit found that witnesses are an "integral part of the judicial process," performing "activities...intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 580 F.2d at 109 (quoting *Imbler*, 424 U.S. at 430).

In addition, courts have granted participants in the judicial system absolute civil immunity, because they exercise discretion. For example, in *McGhee v. Moyer*, 60 F.R.D. 578 (W.D. Va. 1973), the United States District Court for the Western District of Virginia declared that "judicial immunity would perhaps extend to a court clerk in her exercise of discretionary duties...." *Id.* at 585.

Although witnesses do not exercise discretion in the decision of whether to testify, it is clear that witnesses do exercise discretion in the manner in which they respond to questions. Because witnesses do exercise discretion, all witnesses, including police officers, should be granted absolute judicial process immunity from §1983 liability, if witnesses are to continue to testify in an uninhibited and free manner.

> The act of testifying, while compulsory in the sense that one in Goodwin's position cannot freely decline to answer the judge's inquiries, is nonetheless discretionary in that substantial judgment determines the nature of the testimony given. From the perspective of a questioned party, whose knowledge and certainty on the point of interest may be great or small, few inquiries can be said to have but a single honest and correct answer. Discretion and choice determine how best to respond, in view of the precise framing of the question and the state of the witness's knowledge.

Briggs v. Goodwin, 569 F.2d 10, 35, n. 32 (D.C. Cir. 1977) (dissenting opinion).

In conclusion, all witnesses, including police officers, are entitled to absolute immunity from §1983 liability, because witnesses play an integral part in the judicial process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals be affirmed, and that this Court declare that all witnesses, including police officers, are absolutely immune from civil liability pursuant to 42 U.S.C. §1983.

Respectfully Submitted,

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Petitioner's Reply Brief

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No. 81-1404

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CARLISLE W. BRISCOE,

Petitioner,

v.

MARTIN LAHUE,

Respondent.

CHRIS P. VICKERS SR. AND JAMES N. BALLARD,

Petitioners,

v.

JAMES W. HUNLEY, individually and in his capacity as an agent or employee of the Cedar Lake, Indiana Police Department,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

I.

The 1871 Civil Rights Act Was Designed To Expose State And Local Officials To A New Form Of Liability. The Creation And Recognition Of The Constitutional Tort Described By § 1983 Calls For A Re-examination Of Pre-existing Common Law Immunities, Including The Common Law Witness Immunity, When Asserted In The Constitutional Tort Context

Respondents have placed substantial reliance upon the historical underpinnings of the common law witness immunity in arguing that the decision of the Court of Appeals below holding that they are entitled to absolute immunity from civil liability under § 1983 should be affirmed. Respondents have also advanced numerous policy considerations which they contend counsel an extension of absolute common law witness immunity to § 1983 actions. Recent decisions of this Court indicate that questions of immunity from § 1983 damages actions must be examined through careful inquiry into historical and modern policy considerations. Nonetheless, respondents have studiously avoided addressing a very significant aspect of the question being currently presented to this Court. This Court has stated:

> Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat any promise of the statute [42 U.S.C. § 1983] to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983.

Newport v. *Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981).

Respondents' brief completely avoids the question of whether common law witness immunity is compatible with the purposes of § 1983. Notwithstanding respondents' avoidance of this question, the answer to it is critical to a resolution of this case.

This Court recognized in its decision in *Butz* v. *Economou*, 438 U.S. 478, 495 (1978) that a transgression by a government official which is not only "wrong under local law, but also

violated those fundamental principles of fairness embodied in the Constitution" can be, and has been, found to be actionable as a "constitutional tort", even when it might not be actionable when construed as purely a "wrong under local law." Thus, this Court held in *Butz* that common law actions barred by the doctrine of absolute immunity in *Spalding* v. *Vilas*, 161 U.S. 483 (1896), and *Barr* v. *Matteo*, 360 U.S. 564 (1959), would not be barred in this constitutional tort context. Similarly, the holding of this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), led to an alteration in the scope of previously-accorded immunities to executive officials and resulted in the granting of a qualified, rather than absolute, immunity from damages actions.

It is the solicitous attitude that this Court has demonstrated towards sacred constitutional guarantees (an attitude which is the very embodiment of the policy behind § 1983) that has led to a contraction in the scope of immunities traditionally accorded under common law, non-constitutional actions. Respondents' failure to provide any substantial commentary on this crucial distinction is a telling one. The fact that respondents' unlawful activities in perjuring themselves during petitioners' state criminal trials were transgressions of constitutional dimensions requires a complete re-examination of the immunity accorded at common law to witnesses and, for the reasons advanced below, a contraction of the absolute immunity granted to lay witnesses in the past.

II.

The Legislative History Of The 1871 Civil Rights Act Indicates That The Extension Of Absolute Immunity From Liability For Perjurious Testimony Is Contrary To The Legislative Intent Of The 42nd Congress

Petitioners argued in their opening brief that the legislative history of the 1871 Civil Rights Act, Section 1 of which became § 1983, demonstrated that perjury was a major concern of the 42nd Congress. The concern demonstrated in the legislative history indicated that perjury was one of the evils that Congress hoped to deter by passage of the Act. Thus, because

§ 1983 was a part of that Act, petitioners contend that the 42nd Congress clearly foresaw perjury as being actionable under the Act. Therefore, Petitioners contend that the doctrine of absolute immunity from damages liability would contradict the congressional intent in passing the Act.

Respondents neither contest petitioners' assertion that perjury was a major concern of the 42nd Congress nor do they assert that the legislative history indicates anything other than that perjury would be, and is, actionable under the Act. Respondents are satisfied with asserting that the 42nd Congress was concerned with perjured testimony by private citizens and that, therefore, any attempt by petitioners to draw a distinction between police officer witnesses and lay witnesses should fail.

First, respondents misapprehend petitioners' argument with respect to the legislative intent of the 42nd Congress. Petitioners' arguments with respect to legislative intent do not revolve around any distinction between lay and government official witnesses. Petitioners simply assert that it was the intent of Congress, in passing the Act, to attempt to curb specific abuses, one explicit example of such abuses being perjury. It is true that the legislative history of the 1871 Act does show Congress' concern for perjured testimony given by lay witnesses. It is not petitioners' intent to argue, within the parameters of this case, that witness immunity, in its entirety, should be abolished. Certainly, such a broad issue is not presented to this Court by this case. On the other hand, it is reasonable to assume that, if the 42nd Congress demonstrated through its legislative history that it wished to make perjury actionable with respect to lay witnesses (which, apparently, respondents are suggesting, Resp. Mem. p.36), there appears to be little reason to argue that Congress did not intend that perjury by governmental officials would, similarly, be actionable.

Further, as this Court commented in the recent decision in *Nixon* v. *Fitzgerald*, 102 S.Cp. 2690 (1982), and in other previous decisions, this Court has adopted the stance that ques-

tions relating to the immunity of government officials from civil damages liability will be "informed by the common law. . . . at least in the absence of explicit Constitutional or Congressional guidance. . . ." 102 S.Cp. at 2701. Thus, reason and logic suggest that common law witness immunity should not be accorded great significance due to "explicit Congressional guidance" to the contrary, as demonstrated in the legislative history of the 1871 Act. Respondents have done little or nothing to dispute this question and petitioners suggest that the legislative history clearly indicates that the giving of perjured testimony should be actionable under § 1983.

III.

Careful Inquiry Into The History Of Common Law Witness Immunity And The Policies Behind It And Consideration Of Modern Policy Factors Dictate That Police Officers Should Not Be Granted Absolute Immunity From Civil Damages Liability Under § 1983 For Giving Perjurious Testimony At State Court Criminal Trials.

A. The primary policy reason behind common law witness immunity was the effort to free witnesses from intimidation or harassment that might result from the threat of future litigation. Because modern day police officers are not subject to intimidation or harassment for the giving of their testimony, the primary policy behind common law witness immunity should not apply and absolute immunity should not be extended to police officers who give perjured testimony.

As respondents have pointed out, a tradition of common law witness immunity can be traced to the pronouncements of British courts as early as the sixteenth century. A reading of British decisions relating to common law witness immunity does not provide a crystal-clear picture as to the original policy underlying common law witness immunity. Nonetheless, as respondents argue in their brief (Resp. Mem. p. 23), the primary reason for granting absolute civil immunity to witnesses was a concern that witnesses would be intimidated, and thus, would not speak freely, if they felt they were subject to a civil

action alleging that the testimony they gave was perjured. It is true that most of the states have adopted one form or another of the common law witness immunity spawned by the British courts.[1]

Respondents have improperly characterized Petitioners' arguments as being that absolute common law witness immunity should be reaffirmed as to all witnesses with the exception of testifying police officers. First, this case does not present to this Court the issue of whether all witnesses should be deprived of absolute common law immunity. Petitioners' arguments in their opening brief, to the extent that they drew distinctions between lay witnesses and police officer witnesses, were not advanced with the idea of calling for a reaffirmation of common law witness immunity as it relates to lay witnesses. Because this case involves witness-defendants that are local police officers, Petitioners have confined their arguments to policy considerations relating directly to police officer witnesses and not to other potential government official defendants who might perjure themselves during the course of judicial proceedings. Because the issues of this case are strictly endemic to testifying police officers, there is no reason to devote argumentation to other types of governmental officials or to scrutiny isolated to lay witnesses.

As stated above, the primary policy behind common law witness immunity was to free witnesses from intimidation or

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[1] *But See, Lescale* v. *Joseph Schwartz Co.*, 116 La. 293, 40 So. 708 (1906); *Maine Rev. Stat. Ann.* (1964) ch. 14 § 870, which states:

When a judgment has been obtained against the party by the perjury of a witness introduced at the trial by the adverse party, the injured party may, within three years after such judgment or after final disposition of any motion for relief from the judgment, bring an action against such adverse party, or any perjured witness or confederate in the perjury, to recover the damages sustained by him by reason of such perjury; and the judgment in the former action is no bar thereto.

harassment, real or imagined, that they might suffer from if they felt they were under a threat of litigation for statements made during the course of their testimony. It was felt that if witnesses were freed from potential intimidation they would, consequently, submit their disputes for judicial resolution.

Regardless of whether policy considerations that existed in Britain in the sixteenth century would continue to counsel absolute witness immunity to lay witnesses today, it is clear that most, if not all, of the factors that would lead to intimidaton of a lay witness are not present in the case of a police officer witness.

First, petitioners contend that testifying on behalf of the state in order to pursue criminal convictions resulting from investigations conducted by police officers is a duty of local police. Not only is it a duty which is normally prescribed by internal police regulations or, at a minimum, well-established custom and practice, but it is certain that police officers do not need encouragement to testify as to the results of their investigatory activities. If the state chooses to pursue a conviction to and through a criminal trial, police officers should be, and usually are, anxious to testify in order to justify their investigatory activities and to complete the process whereby the state seeks to gain convictions for criminal activity.

Respondents attempt to denigrate petitioners' arguments in this regard by asserting that lay witnesses have a similar "duty" when they are served with a trial subpoena. Petitioners do not dispute the responsibility of a lay witness to properly respond to a subpoena. However, the distinction drawn by respondents is a false one. To the average lay witness, the "duty to testify" issuing from a trial subpoena may be a once-in-a-lifetime experience. For a policeman, the duty to testify will have been established without the necessity of a subpoena. Furthermore, it is likely that policemen will be called upon to testify in a regular, systematic fashion. The difference between the lay and police officer witnesses, as far as their respective "duties" to testify are concerned, is that the lay witness' duty is prescribed by a subpoena and is, normally, a

totally extraordinary situation. A policeman's duty to testify is actually a regular part and responsibility of his job and cannot be considered unique or extraordinary in any fashion.

As pointed out by the court below, most of the duties of the average investigating policeman leave him open to allegations of unconstitutional activity for which the policeman is entitled to only qualified immunity. Thus, the addition of potential liability for giving perjurious testimony, when added to the lexicon of other activities for which a police officer is potentially liable under § 1983, does not provide sufficient residual disincentive in order to persuade policemen from coming forward to give testimony in support of the state's prosecution.

Further, contrary to the average lay witness, it is likely that the police officer will be provided with a government attorney to defend him in any civil rights action, including one based upon allegations of perjured testimony. It is also likely that funds provided to satisfy any settlement or judgment will not be the personal funds of the police officer, but rather funds provided through statutory indemnification provisions or municipal insurance proceeds.

Respondents also argue that a decision of this court that withheld absolute immunity from police officers would lead to a psychological toll on policemen who are already subject to stressful situations in their working environment. There can be no dispute that police officers do, often times, work under stressful conditions that can take their toll over time. Nonetheless, it is more than apparent that this type of psychological stress is endemic to the condition of many policemen in modern America regardless of the Court's decision in this case. Further, as pointed out above, because this court chose, in its decision in *Pierson* v. *Ray*, 386 U.S. 547 (1967), to extend only qualified immunity to police officers for most of their investigatory activities, part of the stress a policeman is subject to results from potential civil rights liability. However, there is little evidence to suggest that the latter form of stress has resulted in any substantial impairment of the execution of their

duties.[2] It is not likely, if policemen are given only qualified immunity with respect to testimony they give, that there is sufficient residual psychological stress that would justify denying a remedy to a truly wronged individual.

Respondents also argue that municipal attorneys are overworked and do not have time to defend civil rights actions similar to the case at bar. They also argue that there are insufficient funds that would be necessary to hire attorneys needed to defend alleged perjurying police officers or to purchase sufficient municipal liability insurance policies to cover potential judgments for such actions.

First, it is not established as a matter of record that municipal attorneys are overworked. Even if they were, it is clear that their present workload consists of defending civil rights actions against municipal employees. It would call for the grossest speculation to determine whether the necessity of defending alleged civil rights violations for perjured testimony would result in the breakdown of municipal corporation counsels' ability to provide legal services to their clients. Further, sound policy would not dictate that violations of constitutional rights should not be remedied simply because municipal attorneys are overworked.[3]

Recent decisions by this court in the cases of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), and *Owen* v. *City of Independence*, 445 U.S. 622 (1980), indicate that this Court has forged new areas of potential recovery against municipalities previously unavailable to potential civil rights plaintiffs, even at the risk of subjecting municipalities to further economic loss. Municipalities already have provided for potential losses in the civil rights areas through state or municipal indemnity legislation and municipal liability in-

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[2] *See*, Jaron, The Threat of Personal Liability Under The Federal Civil Rights Act: Does It Interfere With The Performance Of State And Local Government, 13 Urban Lawyer 1, 18 (1981).

[3] *White* concurring opinion in *Imbler* at 436.

surance. Even if further funds were required to hire new municipal attorneys or to purchase further liability insurance, such costs are better spread through a citizenry that will benefit through the reaffirmation of significant constitutional guarantees.

B. The federal court decisions commenting upon the viability of common law witness immunity in the civil rights context are not uniform in their support of absolute immunity. The doctrine of absolute immunity has been rejected in numerous federal court decisions and dissenting opinions. Further, the federal court decisions which have adopted the absolute witness immunity doctrine have done so without conducting any careful inquiry into considerations of history and policy and, therefore, are deprived of much significant precedential effect.

The unanimity of thought within the British court system regarding the common law witness immunity rule has not been shared by American federal courts who have been asked to decide whether said common law witness immunity should be extended to the constitutional tort context. Federal courts have found perjurying law enforcement agents liable under § 1983 in *Briggs* v. *Goodwin*, 569 F.2d 102 (D.C. Cir. 1977), *Hilliard* v. *Williams*, 516 F.2d 1334 (6th Cir. 1975), *U.S. ex rel. Moore* v. *Koelzer*, 457 F.2d 892 (3d Cir. 1972), and *Spears* v. *Conlisk*, 440 F. Supp. 490 (N.D. Ill. 1977). Furthermore, even though the Fourth and Fifth Circuits have decided in favor of common law witness immunity in *Burke* v. *Miller*, 580 F.2d 108 (1st Cir. 1970), and *Charles* v. *Wade*, 665 F.2d 661 (5th Cir. 1982), both decisions resulted in separate opinions by Judges Winter and Kravitch, respectively, that evinced substantial disagreement with the majority decision to extend absolute witness immunity to the constitutional tort context.

A review of the Federal Court decisions cited by respondents as authority for their assertion that common law witness immunity should be extended to the constitutional tort context leads to the conclusion that the courts reaching those decisions did so without the "careful inquiry into history and policy" that

this Court has found to be necessary prior to an extension of a common law immunity to a § 1983 action. Most of the decisions are devoid of any significant analysis of the historical underpinnings of the common law witness immunity and contained even less analysis of modern day policy considerations relating to that immunity in the constitutional tort context. Most of the decisions favoring absolute immunity are the result of slavish deference to the fact that there exists a tradition of common law witness immunity and a seemingly obdurate resistance to any re-examination or contemporary analysis of that doctrine. In a case arising out of the same circumstances as *Dawkins* v. *Lord Rokeby*, 8 L.R. - Q.B. 255 (1873), which respondents cite, the dissenting opinion of Lord Chief Justice Cockburn demonstrates insight into what now could be considered the absence of any reasoned analysis in the federal court decisions granting absolute witness immunity in the constitutional tort context. The Chief Justice stated there:

> For my own part, I should prefer to treat the immunity of judges as a matter positivi juris, as settled by decision and authority rather than as resting on sound or satisfactory principles, on which, were the matter res integra, it would be desirable to act. I cannot believe that judges or juries would fail to discharge their duty faithfully and fearlessly according to their oaths and conscious, or witnesses give evidence less truthfully, from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of. While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purposes of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged.

Dawkins v. *Lord Paulet*, 5 L.R. - Q.B. 94, 110 (1869).

In decisions granting absolute witness immunity in § 1983 actions where an effort is made to conduct an analysis of the immunity, the courts in question rely upon misguided comparisons between their cases and absolute immunity cases rendered by this Court. One such case upon which respondents place substantial reliance is *Myers* v. *Bull*, 599 F.2d 863 (8th

Cir. 1979) *cert. denied*, 444 U.S. 91 (1979). In holding that a police officer witness was entitled to absolute immunity from liability under § 1983, the court drew upon this Court's holding in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) wherein the Court held that prosecutors were immune from § 1983 actions when acting as advocates for the government. The *Myers* court characterized the *Imbler* decision as stressing the need for full disclosure of relevant evidence to the jury, noting that a prosecutor might be reluctant to call witnesses if he were subject to civil suit based on an allegation that he knew or should have known that the witnesses were testifying falsely. The Eighth Circuit held that a similar rationale would apply to witnesses who might be reluctant to give their version of the case if faced with the possibility of civil suit if their testimony where disbelieved by the trier of fact. The weakness of the analogy between a prosecutor and a witness under the circumstances posited by the Eighth circuit exposes the fault in that court's analysis. Under the circumstances suggested, the difficulty encountered by a prosecutor who might be threatened with civil damages liability, that he might be held responsible for the giving of perjured testimony when he has little or no first hand opportunity to be able to gauge the veracity of the testimony offered, clearly counsels in favor of immunity for the prosecutor. However, the underlying basis for this decision, *i.e.*, that the prosecutor cannot be sure that a particular witness is telling the truth but can only act as a vigorous advocate by presenting all relevant facts, is not the same for the witness who is testifying and has a perfect basis upon which to gauge his statements as being false or accurate. The failure of the Eighth Circuit to appreciate the fact that immunity would be justified for a prosecutor for a situation which he has much less than full control over (i.e., insuring the veracity of testimony) but extending the same liability to a person who would have full control, and thus responsibility, for the situation (i.e., the witness who can choose to tell the truth or choose to perjure himself) is an example of the procrustean logic often applied by the courts in an effort to extrapolate this Court's reasoned decisions on absolute immunity questions to situations where the same reasoning is tortured and inappropriate.

C. This Court has extended common law immunities that are absolute in their scope only to situations that are necessary in order to protect governmental decisionmaking. Therefore, because the act of testifying does not involve governmental decisionmaking, absolute common law immunity should not apply.

Justice White, in his concurring opinion in *Imbler* v. *Pachtman*, accurately characterized the scope of immunities granted by this Court in the § 1983 context, by stating that, ". . . unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question." 424 U.S. at 437. Thus, Justice White accurately capsulized the essence of this Court's absolute immunity decisions by showing that, notwithstanding the scope of immunities accorded at common law, in the constitutional tort context the scope of immunities would be limited to qualified, rather than absolute, immunity unless an absolute immunity were considered to be absolutely necessary to protect the governmental decisionmaking process.

Respondents appear to attempt in their brief to characterize their function as witnesses as necessarily involving discretionary activity (Resp. Mem. p. 46, 49, and 50). Even if the activity of testifying were considered to be discretionary (which it should not be in any significant way), this would not qualify the policeman, who otherwise is accorded only qualified immunity under *Pierson* for his other official activities, for absolute immunity. Other acts of policemen such as making arrests and conducting searches and seizures involve discretionary activities. Nonetheless, those activities lead to only a qualified immunity if a policeman is charged with overreaching. It is clear from this Court's cases granting absolute immunity in the constitutional tort context that discretion would have to be so great that it would be routinely characterized as decisionmaking in order to merit absolute immunity. Testifying under oath cannot be so characterized.

Naturally, one can assert that a witness exercises *some* discretion in testifying in a nonmaterial sense in that, semantically, a witness can choose one word to describe a thought or action that would be a synonym of another word that would serve just as well. Nonetheless, such semantical discretion does not involve the kind of discretionary activity that can be characterized as decisionmaking. The sworn witness is still obligated to provide a substantively accurate story in all respects. His or her failure to comply with this obligation can and should subject them to a perjury prosecution and civil damages under § 1983.

The court below recognized that, at least theoretically, witnesses exercise no discretion while they are testifying. A similar sentiment was echoed by Judge Kravitch in her dissenting opinion in the *Charles* v. *Wade* decision.

This Court has granted absolute immunity to judges, prosecutors, legislators, and the President for actions that might otherwise lead to § 1983 liability. However, a clear predicate of each of those decisions is that absolute immunity was necessary to preserve the governmental decisionmaking process. Because testifying does not involve governmental decisionmaking, absolute immunity does not apply.

D. The potential for repetitive or vexatious litigation as a result of a potential finding by this court that absolute immunity will not be extended to the constitutional tort context is not sufficient to alter that result.

It should be noted that it is unfair to characterize a § 1983 action predicated upon alleged perjurious testimony as being necessarily repetitive. It is apparent that an entire prior criminal court trial would not have to be "repeated" in order to litigate the issue of whether damages should be rendered for the giving of perjurious testimony by a single witness. Certainly, criminal perjury prosecutions are not quashed because, to a limited extent, they "repeat" prior trials. There is no reason to believe that a civil trial for which perjury is the central issue should be quashed any more than a criminal perjury prosecution.

Furthermore, although it is not one of the more welcome aspects of American judicature, parties have had to learn to live, at times, with what might be characterized as repetitive litigation. The "repetition" in question is the retrial of cases which have been previously tried to a verdict but which are reversed and remanded on appeal. The fact that there can be a true repetition of litigation in this sense (much more so than the sense that Respondents would seem to suggest) does not counsel the overthrow of our appellate system. Similarly, the fact that certain portions of trials may be repeated should not be considered of such great significance that no repetition should be contemplated.

Furthermore, petitioners would point out that there is the potential for vexatious litigation under any legal theory of recovery. The fact that this Court might determine within this case that a civil damages action could be brought under § 1983 against a perjuring police officer-witness would not raise, for the first time, the spectre of vexatious litigation. However, summary procedures available to the federal courts would allow for a rapid dispatch of truly vexatious litigation if such a disposition were deserved. Motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) can be brought in an effort to dismiss defective pleadings. If a deceptive but artful pleader circumnavigates such a motion, it is clear that the defendants who have been unjustly accused have summary judgment procedures prescribed by Federal Rule of Civil Procedure 56 available to them in order to effect a prompt resolution of a meritless claim.

E. Other characteristics endemic to the judicial process do not call for the extension of absolute witness immunity to the constitutional tort context.

The right to cross-examination and appeal and the potential for criminal perjury and criminal civil rights prosecutions, pursuant to 18 U.S.C. § 242, have frequently been cited as reasons for extending absolute witness immunity to the constitutional tort context. Notwithstanding the availability of

these matters, they are not sufficient to justify absolute immunity.

The principal reason for the passage of § 1983 was to provide a damages remedy to the victim of constitutional violations perpetrated by state officials. There also was a strong hoped-for deterrent effect stemming from private civil damages actions. None of the referred-to judicial characteristics provides compensation to the victim of constitutional violations. In a general sense, it is possible that the pertinent procedures may provide something in the nature of a deterrent effect. Nonetheless, petitioners demonstrated in their original brief that there is a substantial likelihood that criminal perjury and civil rights prosecutions are not brought with sufficient frequency to establish a true deterrent effect. If anything, it can be considered that the existence of criminal perjury and civil rights cases exhibits the degree of condemnation attached to the giving of perjured testimony and militates in favor of any and all sanctions that might be imposed against a person who gives perjured testimony. It is anomalous that there is a clear policy favoring strong sanctions such as imprisonment for an act but where there might be a total preclusion of any remedy provided to a private individual who was the most immediate and direct victim of this criminal activity.

The private attorney general theory embodied in the Civil Rights Attorneys Fees Award Act of 1976 (42 U.S.C. § 1988) exhibits a strong intent on the part of Congress to provide incentives, rather than disincentives, to private individuals to prosecute violations of civil and constitutional rights. The small number of criminal civil rights prosecutions instituted by the Government emphasizes the need for private attorney general enforcement in this area.

The rights to cross-examination and appeal cannot be considered adequate substitutes for a private civil damages remedy. Certainly, these rights are significant to state criminal defendants. Nonetheless, their effectiveness, particularly in light of an artfully deceptive witness, may be illusory. The credibility of witnesses at trial is very seldom a determinative

factor in the reversal of a criminal conviction. Also, it is true that, in many state criminal prosecutions, the ability to conduct effective cross-examinations is limited by the lack of availability of effective pre-trial discovery procedures and the strong potential for a criminal defendant's being caught off guard by a deceptive police officer witness.

IV.

Policemen Are Acting Under Color Of State Law When They Testify As A Part Of Their Duties And When The Content Of Their Testimony Relates To The Execution Of Their Duties

Respondents contend that, in order to resolve the question of whether a civil rights defendant is acting under color of state law, the trier of fact must determine ". . . the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty . . ." (Resp. Mem. p. 39-40). Petitioners do not espouse the concept that, simply because a man or woman is a police officer, anything he or she might do would be actionable under § 1983. It is clear that this is not true particularly when the activity in question has no relation to the police officer's duties. But it is also clear that there are many things that could be done by a police officer, both on and off duty, that could fall into this category of activity.

Petitioners do not contend that every time a police officer testifies during a judicial proceeding that he is acting under the color of state law. Certain prerequisites must be met before such a determination can be made. These prerequisites would include the fact that the police officer would identify himself or herself as a police officer, that the police officer would be acting, in effect, as a representative of the state during his testimony and that he would be called by the prosecution to support the state's case against the criminal defendant. It also would be necessary for the content of the police officer's testimony to relate to things that he did, saw, heard or otherwise experienced in the line of his other duties as a police officer. Further, a significant consideration would be whether it was a duty of the police officer to give the testimony in question. This

latter point has been repeatedly raised in decisions construing the meaning of the "under color of law" prerequisite.

Respondents have characterized the rationale of the Court in *Johnson* v. *Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968) as exemplifying the meaning of "under color of law." Respondents quote extensively from the *Johnson* decision, wherein the district court clearly equated the "pretense of law" with the performance of duties of the policeman. In finding that a proper claim of activity under color of state law had not been made, the court noted that it had not been alleged that the activity in question "related to the performance of police duties." Obviously, the corollary of this statement would be that, if the activity in question were related to the performance of police duties, this would have been sufficient to meet the "under color of law" prerequisite of § 1983. (Resp. Mem. 39-40).

Petitioners assert that any activity engaged in by a police officer that is an actual duty or relates to his duties has to be considered as being done under the "pretense of law" and, thus, meeting the "under color of law" requirement of § 1983. Acts performed as actual duties or related to duties by police officers meet the "but for" test discussed by respondents. Such acts would not be performed but for the fact that said police officers are simply executing their duty or engaging in activities related to duties that result from authority conferred by the state upon the police officer.

Respondents argue that Indiana state statutes are silent as to any duty of a police officer to testify at state criminal proceedings in order to support the state's case. Of course, the content of the Indiana state statutes does not settle the question as to whether testifying is such a duty. The duty can be prescribed by internal police regulations or simply by custom and practice. Petitioners assert that testifying in the manner indicated is a duty of local police officers. The fact that state statutes do not refer to this duty does not foreclose the possibility that petitioners could prove at trial that respondents were acting pursuant to their duties. If given an opportunity, petitioners will prove this fact.

Petitioners' opening brief referred this Court to the portion of the Court of Appeals' decision below, wherein the Court clearly indicated that the proof of the facts discussed above would demonstrate that testimony given by a police officer was given under the color of state law. Petitioners' suggest that the Court of Appeals was correct in this regard and that its analysis should be affirmed.

V.

There Is No Absolute Judicial Process Immunity. Therefore, Respondents Should Not Be Granted Such Immunity.

Petitioners would suggest that there is no clearly defined absolute judicial process immunity such as that suggested by respondents. It is true that this Court has held that both judges and prosecutors are entitled to absolute immunity from civil damages actions. However, this does not automatically indicate that every person who has anything to do with a judicial proceeding is absolutely immune from damages actions.

First, respondents' approach to this matter completely disregards the functional analysis that has been prescribed by this Court in immunity decisions. The Court has consistently scrutinized the specific type of activity alleged to have been violative of a plaintiff's civil rights in order to determine that particular activity's nature, whether it involved discretion, and, in absolute immunity cases, whether the level of the discretion was so high as to involve decisionmaking. If this Court were to explicitly adopt the absolute judicial process immunity demanded by respondents, the Court's substantial reliance upon functional analysis would be completely disregarded.

Respondents place great reliance upon the necessity for the proposed absolute judicial process immunity by suggesting that it will be necessary in order to insure the integrity of the judicial branch of government and to avoid the degradation of the judicial process. Arguments basically identical to these arguments have already been rejected by this Court in its recent decision in *Dennis* v. *Sparks*, 449 U.S. 24 (1980).

In *Dennis*, the petitioner, who was a party to a state court action alleged to have been corrupted by petitioner's attempts to bribe the state court judge, argued that he should have immunity derived from that of the judge or the judge's official immunity would be seriously eroded. The Court found that, if the state court judge were called to testify at the trial of the matter, that testimony would take time and energy that would otherwise be devoted to judicial duties and the Court recognized that the judge's integrity and that of the judicial process might be at stake in such a case. The Court found, however, that judicial immunity was not designed to insulate the judiciary from all aspects of public accountability. The concluding remarks of this Court are particularly apposite to the facts of the case at bar. The court there said:

> ". . . but we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in perverting the judicial process and in so doing inflict injury on other persons."

449 U.S. at 31-32. The holding in *Dennis* clearly denigrates the notion that there is a substantial derivative immunity predicated upon absolute judicial immunity.

It is true that the immunity granted prosecutors has been characterized as quasi-judicial. Nonetheless, this is understandable in the sense that the discretion exercised in the decisionmaking of a prosecutor clearly approximates that of a judge. Nonetheless, as has been demonstrated above, a witness does not exercise any real discretion and is not involved in decisionmaking. Thus, the rationale for extending immunity to a prosecutor does not apply to a witness.

Remarks made by Lord Chief Justice Cockburn in his dissenting opinion in *Dawkins* v. *Lord Paulet*, *supra*, are pertinent to this case. Lord Chief Justice Cockburn remarked:

> I cannot bring myself to think that it is essential to the well-being of our military or naval force, that where authority is intentionally abused for the purpose of injustice

> or oppression, where charges are preferred which to the knowledge of the party preferring them are intentionally unjust, where representations are made which the party making them knows to be slanderous and false, the party injured, whose professional prospects may have been ruined and whose professional reputation may have been blasted, is to be told that the Queen's Courts, in a country whose boast it is that there is no wrong without redress, are shut to his just complaint.

5 L.R. - Q.B. 94 at 108-9.

It is extremely important that petitioners' right to bring this action be reaffirmed. The concepts of justice and fair play that we consider to be inherent in the American judicial system and the policy behind the 1871 Civil Rights Act would be seriously eroded through a holding in favor of respondents. Petitioners should be allowed their day in court.

CONCLUSION

The judgment of the court of appeals should be reversed and this matter should be remanded for further consideration in light of an opinion that there is only a qualified good-faith immunity for police officers alleged to have perjured themselves in state court criminal proceedings.

Respectfully submitted,

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Docket Sheet

NO. 81-1404-CFX (Vide: 81-6404) See: 81-1881	TITLE Carlisle W. BRISCOE, Chris P. VICKERS, Sr., and James N. Ballard, Petitioners, v. Martin Lahue and James W. Hunley, etc.
DOCKETED	COURT
Jan. 25, 1982	United States Court of Appeals for the Seventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for petitioners: Edmund B. Moran, Jr.
	Counsel for respondents: William T. Enslen, Harriet Lipkin
Jan. 25, 1982	Petition for writ of certiorari filed.
Jan. 25, 1982	Motion of petitioners Chris P. Vickers, Sr. and James N. Ballard for leave to proceed in forma pauperis filed.
Feb. 23, 1982	Brief for the respondents in opposition filed.
Feb. 24, 1982	DISTRIBUTED. 3-19.
Mar. 22, 1982	The motion of petitioners Chris P. Vickers, Sr., and James N. Ballard for leave to proceed in forma paueris is GRANTED. Petition GRANTED.

Mar. 29, 1982	Motion of petitioner Carlisle W. Briscoe for leave to proceed in forma pauperis filed.
Mar. 30, 1982	DISTRIBUTED. 4-2. (Above motion).
Apr. 5, 1982	The motion of petitioner Carlisle W. Briscoe for leave to proceed further herein in forma pauperis is GRANTED.
Apr. 20, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until May 21, 1982.
May 18, 1982	Joint appendix filed.
May 19, 1982	Order FURTHER extending time to file the petitioners' brief on the merits until May 28, 1982.
June 1, 1982	Brief for the petitioners filed.
June 8, 1982	Order extending time to file the respondents' brief on the merits until July 16, 1982.
July 16, 1982	Brief for the respondents filed.
Aug. 25, 1982	CIRCULATED.
Oct. 22, 1982	Reply brief of petitioners filed.
Nov. 9, 1982	ARGUED.